

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

No. 76-6077

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VERMONT LOW INCOME ADVOCACY COUNCIL, INC.,

Plaintiff-Appellant,

v.

WILLIAM J. USERY, SECRETARY OF LABOR,

Defendant-Appellee.

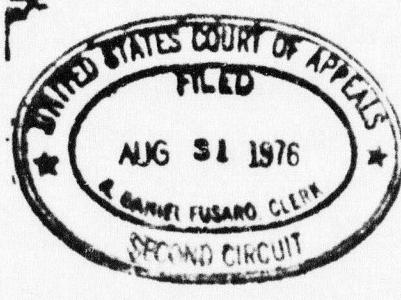
ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF VERMONT

BRIEF FOR THE APPELLEE

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ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF VERMONT

BRIEF FOR THE APPELLEE

QUESTION PRESENTED

Whether the district court correctly held that the complainant was not entitled to attorney fees pursuant to 5 U.S.C. 552(a)(4)(E) in this Freedom of Information Act suit.

STATEMENT OF THE CASE

The Vermont Low Income Advocacy Council, Inc. requested from the Department of Labor, pursuant to the Freedom of Information Act (5 U.S.C. 552), certain information pertaining to the 1975 autumn apple harvest.

* / William J. Usery, who has succeeded John Dunlop as Secretary of Labor, is automatically substituted as defendant-appellee pursuant to Rule 25(d), F.R.Civ.P.

After its request had been preliminarily denied by the Regional Office, and its appeal to the Solicitor of Labor had not been acted upon within the time limits established by 5 U.S.C. 552(a)(6) for the exhaustion of administrative remedies, the Council filed this suit pursuant to 5 U.S.C. 552(a)(4)(B). Subsequent to the filing of the complaint (after the government had filed its answer and the plaintiff had moved for summary judgment) the Solicitor of Labor made the requested documents available with some deletions. The government then moved to dismiss the complaint and the plaintiff moved for attorneys' fees and costs pursuant to 5 U.S.C. 552(a)(4)(E). The district court, after a hearing, denied attorney fees and costs and dismissed the action. This appeal followed.

STATEMENT OF THE FACTS

On August 28, 1975, the Vermont Low Income Advocacy Council, Inc. requested the regional office of the U.S. Department of Labor in Boston, Massachusetts to furnish within ten days pursuant to the Freedom of Information Act (FOIA):

All records, reports or documents prepared by Department of Labor "monitors" in connection with on-site evaluations of all Vermont apple growers' efforts to recruit domestic labor to pick the the 1975 apple harvest [prepared at any time during the period May-July 1975] (A. 21).

On September 8, 1975, the Acting Regional Director replied that the requested information could not be

disclosed because it was exempt as "intra-agency memoranda containing data, views, and opinions necessary for the functioning of government and the making of informed decisions by its officers" (A-22). The Council was advised that it had a right of appeal to the Solicitor of Labor in Washington, and thereafter a right of judicial review (Ibid.).

On September 16, 1975 the Council appealed to the Solicitor of Labor (A-23). On October 2, 1975 (in a letter misdated "September 2") Sofia P. Petters, Administrative Counsel for Legal Services, Office of the Solicitor of Labor, advised the Council that it would receive a decision on its appeal by October 22, 1975, noting, however, that before a determination could be made the record would have to be obtained from the regional office (A-25).

On October 30, 1975, the attorney for the Council advised Ms. Petters that he had not yet received a decision on the appeal and that he intended to commence an action unless the requested materials were received by November 5, 1975 (A-26).

On November 6, 1975, Ms. Petters sent the following telegram to the attorney for the Council:

RE YOUR FOIA APPEAL. FILE NOT RECEIVED
IN THIS OFFICE BECAUSE NOT LOCATED.
UNDERSTAND FILE IN THE MAIL TO US TODAY.

PLEASE ADVISE YOUR TELEPHONE NUMBER 1/
SO THAT WE MAY CONTACT YOU TO DISCUSS.

Six days later, on November 12, 1976, the Council filed its complaint. (A-2, 3). On December 16, the government filed its Answer (A-2,29). On the same date the Council moved for summary judgment (A-2,17).

On December 22, 1975, the Solicitor of Labor advised the Council that he had reviewed the record in response to its appeal and that the requested information would be made available except for certain deletions necessary to prevent invasions of personal privacy (A-36).

On January 12, 1976 the Council withdrew its motion for summary judgment (A-68) and moved for attorney fees and costs pursuant to 5 U.S.C. 552(a)(4)(E) (A-33). The government opposed that motion and moved to dismiss the action as moot (A-40). In support of its motion the government offered sworn affidavits of Ms. Petters and an attorney in the Boston Regional Solicitor's Office, Nicholas J. Laezza, which explained the Department of Labor's handling of the Council's request (A-41,50,51). Ms. Petter's affidavit describes the events set forth above, adding the additional facts that the Boston office had mistakenly forwarded on November 6, 1975 the records for the period from September-October 1975 rather than the records for the period from May-July 1975 which were requested by the Council (A-53). This mistake

1/ This telegram was not acknowledged.

was not corrected until December 9, 1975, after an extensive search had been made for the correct records (A-53,55), thus delaying the Solicitor General's decision.

On February 27, 1976, a hearing was held before Chief Judge James S. Holden on the Council's motion for attorney fees and costs (A-69). On April 11, 1976, the court denied the motion and dismissed the action (A-88). The court reasoned:

The assessment of counsel fees and costs under 5 U.S.C. 552(a)(4)(E) is available in the court's discretion to a complainant who has "substantially prevailed." In differing contexts a prevailing party is generally held to be "the party in whose favor judgment is rendered . . ." Mobile Power Enterprises, Inc. v. Power-Vac, Inc., 495 F.2d 1311, 1312 (10th Cir. 1974). And an election to favorably settle an action does not transform a compromising litigant into a prevailing party. Id. To hold otherwise would tend to discourage voluntary compliance after judicial review is undertaken. Such a course would work against the policy of the Act. (A-93)

The court concluded:

Here the plaintiff asserted its complaint in proper administrative proceedings. In the first instance the information was withheld on what may have been an erroneous interpretation of the recent statute. On appeal the administrative decision was delayed until the correct requested material could be retrieved from the regional office. While the delay generated the present litigation, as soon as the defendant discovered the plaintiff was

lawfully entitled to a part of the records, the appropriate material was supplied. Certain material was withheld, apparently with some legal justification. In any event, there is nothing this court has done to grant the plaintiff the relief prayed for in the complaint. There has been no judicial action to establish the plaintiff as the prevailing party. The plaintiff's motion for an award of attorney's fees and costs will be denied. (A-94).

The Council timely noted this appeal.

STATUTES INVOLVED

The Freedom of Information Act is codified at 5 U.S.C. 552 et seq.

The subsections relevant to this appeal are --

Subsection (a)(4)(B)

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

Subsection (a)(4)(E)

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

Subsection (a)(6)(A)

Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall --

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

Subsection (a)(6)(C)

Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth

the names and titles or positions of each person responsible for the denial of such request.

Subsection (b)

This section does not apply to matters that are --

* * * *

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files, and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

ARGUMENT

Introduction and Summary.

The Freedom of Information Act as amended in 1974 (P.L. 93-502) provides as follows for the assessment of attorney fees, 552(a)(4)(E):

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

Since this Court has not previously construed this provision, we think that it will be worthwhile to set forth the legislative history of Section 552(a)(4)(E).

Present Section 552(a)(4)(E) had its genesis in the Report of the Committee on Government Operations rendered in 1972. (House Report No. 92-1419, 92d Cong., 2d Sess., Leg. Hist. p. 3, et seq.).^{2/} After conducting

^{2/} "Leg. Hist." citations are to the Joint Committee Print, FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (94th Cong., 1st Sess., March 1975).

extensive hearings the Committee recommended certain measures for incorporation in the Freedom of Information Act to improve its operation. (Leg. Hist., p. 90). One such recommendation was:

Court costs and reasonable attorneys' fees should be awarded, in the discretion of the court, to the complainant if the court issues an injunction or order against the Government agency on a finding that the information sought was improperly withheld from the complainant. (Ibid.) (Emphasis added).

It was suggested at the hearing held by the Committee that such a provision was desirable to meet the problem of the high cost of obtaining relief experienced by private individuals. (Leg. Hist. 80). It was also suggested at the hearings that the availability of attorneys fees would discourage agencies from the wrongful withholding of documents; thus one witness suggested that fees be awarded "if the court finds that a defense raised at agency level was not made in good faith" (Leg. Hist. 47).

There can be no doubt that the attorney fee and costs provision subsequently included in the FOIA Amendments was intended by the Congress both to remove an impediment which had become a serious disincentive to invocation of the Act by private individuals and to force agencies to consider their chances of prevailing in court before routinely resisting requests for disclosure of information. House Rept. 93-876, 93rd Cong., 2d Sess., Leg. Hist., pp. 126, 130; Senate Report 93-854, 93rd Cong., 2d Sess., Leg. Hist., pp. 169-172, 193;

Conference Report (H. Rept. 93-1380), 93rd Cong., 2d Sess., Leg. Hist., pp. 226-227; Rocap v. Indieek, U.S. App. D.C. ___, ___ F.2d ___, No. 75-1806, June 21, 1976, slip op. p. 11.

The language of present Section 552(a)(4)(E) reflects a compromise arrived at in conference. Both the House and Senate Bills had made provision for the discretionary award of attorney fees. The House bill provided:

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the United States or an officer or agency thereof, as litigant, has not prevailed. (H.R. 12471, 93rd Cong., 2d Sess. section (1)(e); Leg. Hist. 147). (Emphasis added.)

The Section-By-Section analysis of the House Report indicates simply that:

Section (1)(e) . . . allows the assessment of fees and costs against the agency on behalf of a litigant. The assessment of fees and costs is at the option of the court (House Rept. 93-876, supra, Leg. Hist., p. 130) (Emphasis added).

The Senate bill provided for the discretionary assessment of attorney fees against the government in cases in which "the complainant has substantially prevailed" and set specific criteria for the exercise of the court's discretion:

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially

prevailed. In exercising its discretion under this paragraph, the court shall consider the benefit to the public, if any, deriving from the case, the commercial benefit to the complainant and the nature of his interest in the records sought, and whether the government's withholding of the records sought had a reasonable basis in the law. (S. 2543; Leg. Hist., p. 202.) (Emphasis added.)

The Senate Report explained:

The bill allows for judicial discretion to determine the reasonableness of the fees requested. Generally, if a complainant has been successful in proving that a government official has wrongfully withheld information, he has acted as a private attorney general in vindicating an important public policy. In such cases it would seem tantamount to a penalty to require the wronged citizen to pay his attorneys' fee to make the government comply with the law. However, the bill specifies four criteria to be considered by the court in exercising its discretion: (1) The benefit to the public, if any, deriving from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding had a reasonable basis in the law. (Senate Rept. 93-854, supra; Leg. Hist., p. 171.) (Emphasis added.)

The Conference Report explained:

The conference substitute follows the Senate amendment, except that the statutory criteria for court award of attorney fees and litigation costs were eliminated. By eliminating these criteria, the conferees do not intend to make the award of attorney fees automatic or to preclude the courts, in exercising their discretion as to awarding such fees, to take into consideration such criteria. Indeed,

the conferees believe that because the existing body of law on the award of attorney fees recognizes such factors, a statement of the criteria may be too delimiting and is unnecessary. (House Rept. 93-1380, supra, Leg. Hist., p. 227) (Emphasis added).

The House debates cast considerable light on what the sponsors of the House bill considered to be the meaning of the term "where the United States . . . as litigant, has not prevailed". In the initial House debate the following colloquy occurred between Representatives Rousselot, Moss and Moorhead:

Mr. Rousselot: [I]n this legislation we say that "the court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section".

So, in fact, foreign citizens and aliens, I was thinking particularly of alien groups that reside here, if they would decide to go to court and the court could, in fact assess the U.S. Government for their legal fees.

Mr. Moorhead of Pennsylvania:
Of course it is conceivable; but first the plaintiff has to prevail, and even if he prevailed, the courts will grant it only at their discretion.

3/
Mr. Moss: Mr. Chairman, will the gentleman yield?

Mr. Moorhead of Pennsylvania:
Mr. Chairman, I yield to the gentleman from California.

Mr. Moss: Mr. Chairman, I was merely going to make the point that

3/ Representative John E. Moss, a member of the House Committee on Government Operations, former Chairman of the Special Subcommittee on Government Information, a manager of the bill, and member of the Conference Committee.

In order for such a person to prevail,
the original withholding would have
had to have been an improper act or
otherwise he could not prevail.

Mr. Roussetot: Mr. Chairman,
where does the language say that?

Mr. Moss: The original Act is
to prevent the improper withholding.

Mr. Roussetot: But where in
this is it?

Mr. Moss: The court here exa-
mines in camera and determines whether
or not the information meets the test
of privilege or whether it is going
to be released.

(Leg. Hist. 241-243; emphasis added.)

* * * *

In Point I of our Argument we demonstrate that the district court correctly denied attorney fees in the instant case because the plaintiff did not "substantially prevail" in this action within the meaning of 5 U.S.C. 552(a)(4)(E).

In Point II we dispose of diverse contentions raised by the appellant.

I.

THE DISTRICT COURT CORRECTLY HELD THAT THE PLAINTIFF DID NOT "SUBSTANTIALLY PREVAIL" SO AS TO BE ENTITLED TO ATTORNEY FEES PURSUANT TO 5 U.S.C. 552(a)(4)(E)

A. It is abundantly clear from the language and legislative history of Section 552(a)(4)(E) that Congress intended that a complainant who "substantially prevailed" be a litigant who had demonstrated in court that the defendant agency had wrongfully withheld information.

This intention was succinctly expressed by Representative Moss when he stated: "[F]or such a person to prevail, the original withholding would have had to have been an improper act" . . . "The original Act is to prevent the improper withholding" (Leg. Hist. 242-243). Nor did Representative Moss stop there. He went on to explain that under the new Act (*i.e.* the 1974 Amendments) the decision that the agency had wrongfully withheld documents would be made by the court in camera. His remarks make it clear that in Congress' view neither an agency's compromise of a claim nor its mere tardiness in producing requested information could afford a basis for awarding attorney fees.

The Senate Report is consistent with the House Managers' views. It notes that: "[I]f a complainant has been successful in proving that a government official has wrongfully withheld information" fees may be awarded at the discretion of the court provided that certain other criteria are met. (Leg. Hist. 171)

The language adopted in Section 552(a)(4)(E) is suited to the congressional intent. A litigant who "substantially prevails" is ordinarily one in whose favor a final order or judgment has been entered. See Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) and Northcross v. Board of Education, 412 U.S. 427 (1973) applying Civil Rights attorney fee provisions containing similar language.^{4/} See also cases construing similar language in Rule 54(d), F.R. Civ. P. which makes costs available to "the prevailing party." 10 Wright and Miller, Federal Practice and Procedure (1970), §§ 2667-2668.

^{4/} 42 U.S.C. 2000a-3(b) construed in Piggie Park Enterprises provides:

In any action commenced pursuant to this subchapter, the court in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as private person.

42 U.S.C. 1617 construed in Northcross pertinently provides:

Upon the entry of a final order by a court of the United States against . . . the United States (or any agency thereof) for failure to comply with the provisions of this chapter or for discrimination . . . the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

While there are cases to the contrary, the better view appears to be that a plaintiff's election to settle an action does not transform a compromising litigant into a prevailing party. Mobile Power Enterprises, Inc. v. Power Vac, Inc., 496 F. 2d 1311, 1312 (C.A. 10, 1974). Moreover, costs are frequently denied where a case has for any reason been mooted prior to the entry of a final judgment. See e.g., Whitehead v. Richardson, 446 F. 2d 126 (C.A. 6, 1971); Williams v. General Food Corp., 492 F. 2d 399 (C.A. 7, 1974); Mello v. Secretary of Health, Education and Welfare, 8 Employment Practices Decisions § 9620 (D. D.C. 1974); Larkin v. McCann, 368 F. Supp. 1352 (E.D. Wisc., 1974). See also Grubbs v. Butz, Secretary of Agriculture, ____ U.S. App. D.C. ___, ____ F. 2d, No. 73-1955, July 26, 1976 wherein the District of Columbia Circuit recently held that a plaintiff had not "prevailed" because she had not shown discrimination so as to qualify for attorney fees within the meaning of the Equal Employment Opportunity Act of 1972.
5/

5/ The Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-16(d), adopts the attorney fee provision of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k):

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

The court of appeals opinion in Grubbs is reproduced in the Addendum for the Court's convenience.

The fact that Congress intended to make the award of attorney fees under Section 552(a)(4)(E) dependent upon a court determination of a "wrongful withholding" is also shown by other language of the Act itself when Section 552(a)(4)(E) is considered in its proper context.

Section 552(a)(4)(E) provides:

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

Immediately following Section 552(a)(4)(F) pertinently provides:

Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding . . . (Emphasis Added.)

When these two sections are read in conjunction, it is apparent that Congress authorized the assessment of attorney fees only when a court orders the production of agency records improperly withheld, and authorized disciplinary proceedings

only upon the award of attorney fees plus an additional court determination that agency personnel may have acted arbitrarily or capriciously. Thus Section 552(a)(4)(F) cannot be ignored in ascertaining the proper construction of Section 552 (a)(4)(E). The two subsections must be read in pari materia.

B. The district courts are divided on the question of whether attorney fees may be awarded where documents are voluntarily released after court suits have been brought.

In Nationwide Building Maintenance, Inc. v. Arthur Sampson, Administrator U.S. General Services Administration, D. D.C. Civ. No. 75-1511, March 15, 1976; appeal pending, C.A.D.C. No. 76-1453, the court (Hon. Howard F. Corcoran, J.) denied attorney fees where the government agency had merely been tardy in producing documents, stating:

[I]t appears to the Court that (1) although defendants have failed to comply with the time requirements of the Freedom of Information Act, 5 U.S.C. 552(a)(6), the circumstances surrounding the withholding indicate that the defendants acted in good faith and with due diligence and do not raise questions whether 'agency personnel acted arbitrarily or capriciously with respect to the withholding' 5 U.S.C. 552(a)(4)(F); and that (2) plaintiff has not 'substantially prevailed' by reason of this action and, therefore, is not entitled to assessment of reasonable attorney fees or other litigation costs against the United States, 5 U.S.C. 552(4)(E). 6/

6/ The court's decision which is unreported is reproduced in the Addendum to this Brief.

Some district courts have taken a contrary view. In Communist Party v. U.S. Department of Justice, D.D.C., Civ. Act. No. 75-1770, March 23, 1975, appeal pending No. 76-1746, on which appellant relies (Brief, p. 22) the court (Hon. Thomas A. Flannery, J.) reasoned:

If the government could avoid liability for fees merely by conceding cases before final judgment, the impact of the fee provision would be greatly reduced. The government would remain free to assert boilerplate defenses, and private parties who served the public interest by enforcing the Act's mandates would be deprived of compensation for the undertaking. Thus a general bar to awards of fees in cases resolved before final judgment cannot be accepted by the court.

(Appellant's Brief, p. 12).

Additionally, the court implied that attorney fees could be awarded whenever a government agency failed to meet the time limitations on exhaustion of remedies contained in 5 U.S.C. 552(a)(6). The court observed:

FOIA contains a strict time schedule within which an agency is to act upon a request, or face the prospect of being taken to court. The agency is bound by this schedule just as it is bound by the Act's provisions mandating disclosure of nonexempt documents. (Appellant's Brief, p. 18)

Communist Party was followed by Judge Flannery in Emery v. Laise, D.D.C. Civ. Act. No. 75-381, June 3, 1976; notice of appeal filed sub. nom. Emery v. Reinhardt.

We maintain that the present case and Nationwide were correctly decided and that Communist Party is contrary to the language and legislative history of Section 552(a)(4)(E) as well as to the fundamental policy of the Freedom of Information Act, as we show below.

C. In the present case the Council did not establish in court that the Department of Labor had wrongfully withheld documents. As Chief Judge Holden observed:

Here the plaintiff asserted its complaint in proper administrative proceedings. In the first instance the information was withheld on what may have been an erroneous interpretation of the recent statute. On appeal the administrative decision was delayed until the correct requested material could be retrieved from the regional office. While the delay generated the present litigation, as soon as the defendant discovered the plaintiff was lawfully entitled to a part of the records, the appropriate material was supplied. Certain material was withheld, apparently with some legal justification. In any event, there is nothing this court has done to grant the plaintiff the relief prayed for in the complaint. There has been no, judicial action to establish the plaintiff as the prevailing party. (A-93-94)

Indeed the Council does not assert here that the Department has wrongfully withheld nonexempt documents. It argues rather that it is entitled to attorney fees because the Department was unable to make the requested documents promptly available. (Brief, p. 8 et. seq.)

However, the legislative history which the Council cites (pp. 8-9) does not indicate that plaintiffs will be entitled to attorney fees when a government agency is unable to supply

requested information until after the commencement of a law suit, but is not proved to have willfully withheld nonexempt information. On the contrary, the very portion of the Senate Report which the Council cites (Footnote 12, p. 8) repeats a comment made at Hearings that: "If the government had to pay legal fees each time it lost a case . . . it would be more careful to oppose only those areas that it had a strong chance of winning" (Leg. Hist., p. 169; emphasis added). Here needless to say the Department of Labor did not lose the case. The Department voluntarily produced the requested documents as soon as its administrative appeals process had been able to function, thereby mooting the case.

It is the government's position that Section 552(a)(6), which places a limit upon the time in which an agency must respond before a plaintiff can invoke the judicial remedy provided by Section 552(a)(4)(B), is merely procedural and cannot of itself afford a basis for a "wrongful withholding" for purposes of Section 552(a)(4)(E). Section 552(a)(6) provides [with exceptions not relevant here]:

(A) Each agency upon any request for records made under . . . this section, shall --

- (1) determine within ten days (excluding Saturdays, Sundays, and legal public holidays, after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

* * * *

(C) Any person making a request to any agency for records under . . . this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. . . .

We think that these provisions are analogous to the provision for the exhaustion of remedies in the 1972 Equal Employment Opportunity Act which extended the procedural protections of Title VII of the Civil Rights Act of 1964 to federal employees complaining of discrimination. That Act provides that a federal employee may file a civil action within 30 days of receiving notice that final action has been taken on his complaint by his agency or by the Civil Service Commission. The right to file an action arises as well if within 180 days the agency has not taken final action on his complaint or the Civil Service Commission has not taken final action on his appeal. (42 U.S.C. 2000e-16). In Grubbs v. Butz, 514 F. 2d 1323, 1328 the District of Columbia Circuit stated:

The 180 day provision represents a Congressional determination that providing prompt access to the courts in discrimination cases is so important that the administrative process will be given only a finite time to deal alone with a given dispute. Indeed, the Act is in part a response to Congressional realization that the doctrine of exhaustion of remedies . . . had become [a] barrier to meaningful court review.

In its more recent decision in Grubbs v. Butz, supra, the court held that Ms. Grubbs could not claim attorney fees as a "prevailing party" under the Act, even though she had successfully litigated a procedural issue in the court of appeals, because: "Ms. Grubbs has yet to demonstrate discrimination" (Add. 07a-08a).

The court's construction of the term "prevailing party" as used in the applicable statute, 42 U.S.C. 2000e-16(d) (See n. 5 supra), is plainly correct because the objective of the Equal Employment Opportunity Act is to prevent discrimination. By analogy, an FOIA litigant should be required to show a "wrongful withholding" to prevail within the meaning of Section 552(a)(4)(E), because the objective of the FOIA is to prevent the improper withholding of information. (Remarks of Rep. Moss, Leg. Hist. p. 243; p. 38 , supra) Such a "wrongful withholding" does not occur when an agency fails to meet the time limitations of Section 552(a)(6) since this section merely "establishes a finite time" (514 F. 2d at 1328) within which agencies must act before a complainant is entitled to go to court.

D. The question of the current construction of Section 552(a)(4)(E) is a matter of utmost financial importance to the federal government and to federal taxpayers generally, since when fees are awarded under this section federal taxpayers must bear the costs of litigating both sides of the dispute. It is a matter of public knowledge that government agencies are experiencing serious difficulties in meeting the statutory time limits of Section 552 (a)(6), even where they are exercising due diligence and have assigned adequate personnel to the handling of FOIA requests. See Open America v. The Watergate Special Prosecution Force, ___ U.S. App. D.C. ___, ___ F.2d ___, No. 76-1371, decided July 7, 1976.^{7/} As a consequence, many of the hundreds of cases now pending in the district courts have been brought because government agencies, like the Department of Labor in the present case, have been unable to process information requests within the 10 and 20 work days provided for initial responses and appeals. Section 552(a)(6)(A). Congress plainly did not provide for the payment of attorney fees in such cases. Thus courts should consider carefully the meaning of the term "substantially prevailed" as used in Section 552(a)(4)(E) before adopting any

^{7/} The slip opinion is reproduced in the Addendum for the convenience of the Court.

The court of appeals said in Open America: "We do not think that Congress intended, by fixing a time limitation on agency action and according a right to bring suit when the applicant has not been satisfied within the time limits, to grant [that applicant] an automatic preference by the mere action of filing a case in the United States district court" (App. 30a).

Similarly we do not think that Congress intended to grant attorney fees to every applicant who receives documents after filing a court suit solely because the agency has not responded within the time limitation.

construction which would automatically transform impatient litigants into prevailing parties. Since a waiver of sovereign immunity is involved here, recent Supreme Court decisions require such an approach. Alaska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 265-268 (1975); Runyon v. McCrary, ___ U.S. ___, 44 L.W. 5034, 5041-5042 (1976).

E. The question is equally important from a public policy standpoint. It is apparent, as perceived by the district court in this case, that awarding fees on the basis of an agency's failure to respond within the time limits of Section 552(a)(6) would work against the policy of the Act to promote the maximum disclosure of information in the public interest.

To this end, Congress has made it plain that the exemptions contained in the Act may be waived by government agencies when waiver is in the public interest. For example, the Senate Report on the 1974 Amendments states:

Congress did not intend the exemptions in the FOIA to be used either to prohibit disclosure or to justify automatic withholding of information. Rather, they are only permissive. They merely mark the outer limits of information that may be withheld where the agency makes a specific affirmative determination that the public interest and the specific circumstances presented dictate -- as well as that the intent of the exemption relied on allows -- that the information should be withheld. (S. Rept. 93-854, 93d Cong., 2d Sess., p. 5, Leg. Hist. p. 158; emphasis in original).

See also Title Guarantee Co. v. National Labor Relations Board, ____ F. 2d ___, C.A. 2, No. 75-6119, April 2, 1976, S. op. p. 3; Charles River Park "A", Inc. v. Department of H. & U.D., ____ U.S. App. D.C. ___, 519 F.2d 935, 941 (1975).

This is entirely consistent with the Attorney General's interpretation announced shortly after the enactment of the FOIA that:

Agencies should keep in mind that in some instances the public interest may best be served by disclosing to the extent permitted by other laws, documents which they would be authorized to withhold under the exemption. (Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, June 1967, at 2-3.

Pursuant to the Attorney General's guidelines and the Congressional policy, the Department of Labor, like other federal agencies, has provided for the waiver of exemptions in appropriate cases. The applicable regulation, 29 C.F.R. 70.11 provides:

Except in the case of records of which disclosure is prohibited . . . each officer of the Department authorized to disclose information from Department records . . . shall make available for inspection and copying . . . any document from the records in his custody if he determines that, notwithstanding the applicability or possible applicability of an exemption from disclosure, the requested inspection or copying furthers the public interest and does not impede the discharge of any of the functions of the Labor Department.

Additionally, the 1974 Amendments to the FOIA require the disclosure of partial information, when feasible, rather than the assertion of across-the-board exemptions. 5 U.S.C. 552 (b) provides:

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this section.^{8/}

The Department of Labor's implementing regulation, 29 C.F.R. 70.29(b) provides:

If a requested record or document contains some materials which are protected from disclosure and other materials which are not so protected, identifying details of protected matters shall be deleted whenever analysis indicates that such deletions are feasible. Any reasonably segregable portion of a record or document shall be provided after deletion of protected matter.

It obviously requires a thorough and conscientious analysis of materials to determine not merely whether they fall within any of the categories of lawful exemptions, but also whether they should be disclosed in whole or in part despite the availability of lawful claims of exemption, and, in many cases, whether disclosure would be contrary to the Privacy Act, 5 U.S.C. 552a. And such analysis is time consuming. As Deputy Attorney General Tyler has frankly reported to the Congress with respect to the Department of Justice's efforts to comply with the FOIA:

The results of our inability to comply with the letter of the Act as to time limits have been exacerbated by our efforts to comply fully with its spirit.
At all times during my tenure as Deputy Attorney General, I have attempted to effect the maximum possible, responsible disclosure of records. It is clear that the Department of Justice is in fact releasing a considerable quantity of technically exempt material. My own view, as you know, is that an exemption

8/ Courts had even prior to the amendments stressed the importance of partial disclosure where, for example, complete disclosure would invade the privacy of individuals. See Rose v. Department of Air Force, 495 F. 2d 261 (C.A. 2, 1974), affirmed, 96 Sup. Ct. 1592 (1976).

is nothing more than a lawful excuse to withhold a record. I stress that access should not be denied unless some reason for doing so exists in terms of the present vital interests of the Department. My insistence on conformity with this policy, however, is an important factor contributing to the backlog within the Appeals Unit. . . . To be absolutely candid, it would be far easier for this Department to follow a practice of merely releasing what is not exempt and withholding that which is. 2/ (Emphasis Added)

The Department of Labor, as this case indicates, is also pursuing a liberal release policy with respect to FOIA requests. However, if the reward for an agency's painstaking review is to have attorney fees assessed against it, either because it has not produced requested materials in time to meet the statutory deadlines, or because its voluntary surrender of lawfully exempt materials has turned the complainant into a "prevailing party", it goes without saying that the quantities of public information released will in the long run be reduced.

In light of the foregoing considerations, we submit that the district court correctly held that to allow fees here where the Department of Labor made a good faith effort to comply with the statutory time limits and subsequently produced (with deletions to protect personal privacy) all the documents pertinent to the Council's request would "work against the policy of the Act." (A. 93)

2/ See Letter from Deputy Attorney General Harold R. Tyler, Jr. to the Honorable Bella S. Abzug, Chairwoman, Government Information and Individual Rights Subcommittee, Chairman on Government Operations, p. 2, in the Addendum to this Brief (46a-47a).

II

THERE IS NO MERIT TO THE VARIOUS
CONTENTIONS RAISED BY
THE COUNCIL ON THIS APPEAL

A. The Council's fundamental contention on this appeal is that it is entitled to attorney fees because it "prevailed" in the judicial proceedings by obtaining virtually all the agency records it had requested approximately four months earlier (Brief, p. 4). This argument is far too simplistic and runs afoul of the congressional intent as expressed in the legislative history of Section 552(a)(4)(E). Congress did not intend "to make the award of attorney fees automatic" (Leg. Hist., p. 227) or to preclude the courts from freely exercising their discretion in the award of fees even to "prevailing parties". Besides, a complainant who receives documents as a result of the internal workings of an agency's FOIA appellate processes is not a "prevailing party", as courts have construed the term in other contexts. See pp. 15-16, supra.

Moreover, the Council cannot rely upon the fact that the statute does not actually bar the award of attorney fees and costs in "the absence of judicial action." (Brief, p.4) Since the statute in question permits the assessment of attorney fees against the United States, it is not enough for the courts to determine that such fees are not barred by that statute; they must determine that they are actually and expressly authorized by the statute. See Alveska Pipeline Service Co. v. Wilderness Society, supra, 421 U.S. at 265-268; Runyon v. McCrary, supra,

44 L.W. 5041-5042. The cases which the Council cites at pages 4-6 of its brief are entirely inapposite because they were not decided under the FOIA Amendments, and they are not cases in which the United States or federal officials acting in their official capacity ^{-10/-} were defendants.

B. The Council's contentions that fee awards are necessary in cases such as this to "encourage prompt settlement by the government in order to minimize liability for fees" and "to effectuate Congress' intent to encourage agency compliance without the necessity of citizen resort to the courts" (Brief, pp. 7-8) overlook the fact that the Congressional oversight committee which simultaneously proposed both time limits for agency responses and a provision for attorney fees and costs, would have restricted the payment of such fees and costs to cases in which "the court issues an injunction or order against the government agency on a finding

^{10/} E.g., Yablonski v. United Mine Workers, 466 F.2d 424 (C.A.D.C., 1972), and Kerr v. Screen Extras Guild, 466 F.2d 1267 (C.A. 9, 1972), decided under the Labor Management Reporting and Disclosure Act; Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (C.A. 8, 1970), and Evans v. Sheraton Park Hotel, 503 F.2d 177 (C.A.D.C., 1974), decided under the Civil Rights Act.

See Duarte v. United States, 532 F.2d 850, 852 (1976), wherein this Court distinguished Bivens v. Six Unknown Named Agents of the Federal Bureau of Investigation, Bivens v. Six Unknown Named Agents of the Federal Bureau of Investigation, 450 F.2d 1339 (C.A. 2, 1972), noting:

Appellant here, however is suing the United States itself and faces an additional obstacle not present in Bivens, namely sovereign immunity.

that the information sought has been wrongfully withheld from the complainant." (Leg. Hist., p. 90). The legislative history which we have set out in the introduction to our Argument makes it clear that Congress never substantially departed from the oversight committee's recommendation. Indeed, this is true even of those portions of the legislative history upon which the appellant relies in this Court. In the excerpt from the Senate Report which the Council cites at page 8 of its Brief, a witness at the hearings is quoted as saying:

If the government had to pay legal fees each time it lost a case . . . it would be more careful to oppose only those areas that it had a strong chance of winning" (Leg. Hist., p. 169. (Emphasis added.)

Similarly the excerpt from the Report cited at page 10 of the appellant's brief states:

The bill allows for judicial discretion to determine the reasonableness of the fees requested. Generally, if a complainant has been successful in proving that a government official has wrongfully withheld information, he has acted as a private attorney general in vindicating an important public policy. In such cases it would seem tantamount to a penalty to require the wronged citizen to pay attorneys' fees to make the government comply with the law. (Leg. Hist., p. 171; emphasis added.)

These excerpts clearly indicate that a policy of withholding fees except where litigants "substantially prevail" in court is consonant with the Congressional objectives in enacting 5 U.S.C. 552(a)(4)(E), as well as with its language and legislative history.

C. The FOIA decisions upon which the Council relies here (Brief, pp. 11-14) are for the most part distinguishable or inapposite on their facts from the case at bar. In Ruiz v. Bedell, D.D.C. Civ. Act. No. 75-0465, September 8, 1975, the complainant did not seek the production of documents but a reduction in an agency's search fees; thus the court did not have occasion to consider the question of what constitutes a wrongful withholding of information. In Consumers Union v. Board of Governors of the Federal Reserve System, D.D.C. Civ. Act. No. 1766-73, October 24, 1975, appeal pending No. 76-1601, the district court had ordered documents produced prior to the time the case was settled; hence there was a court order on which to predicate a fee award. In Goldstein v. Levi, D.D.C Civ. Act. No. 75-0993, June 18, 1976, the plaintiff had been seeking the documents in question for three years, a factor which led the court to decide that he had prevailed in obtaining them only because of the court action.

Communist Party v. United States Department of Justice, supra, was in our view wrongly decided; the District of Columbia Circuit will determine on the pending appeal whether we are correct. We point out here that the portions of the opinion upon which the Council relies at page 12 of its brief are objectionable on two grounds. First, the court imports to government agencies generally a willingness to assert frivolous "boilerplate defenses" which we do not believe is justified by the history of FOIA litigation to date which

has dealt with close questions concerning statutory exemptions even where cases were not resolved in the government's favor. Second, the court overlooks the fact that if an agency asserted such "boilerplate defenses", a court in the exercise of its equity jurisdiction could find a wrongful withholding and award attorney fees even where it was unnecessary to grant injunctive relief.^{11/}

We also disagree with the dicta of Kaye v. Burns S.D. N.Y., 75 Civ. 1873, April 5, 1976 (Appellant's Brief, pp. 12-13), although it will stand unchallenged by direct appeal because the court denied attorney fees in that case in the exercise of its discretion. There, however, the court did find that the legislative intent was "to limit the discretionary award of fees to those parties who were successful in court" (Slip opinion, p. 12), rejecting only the government's contention that a court order for the production of documents was required for a fee award. The opinion does not help the Council in this case where the district court expressly found that "[t]here has been no judicial action to establish the plaintiff as the prevailing party."

(A-94)

^{11/} In this connection we point out that the Congress assumed that the courts would also have inherent equitable powers to enter fee awards in favor of the government where plaintiffs brought frivolous suits. The Senate Report states:

Courts have assumed inherent equitable powers to award fees and costs to the defendant if a lawsuit is determined to be frivolous and brought for harassment purposes; this principle would continue, as before, to apply to FOIA cases (Leg. Hist., p. 172).

Emery v. Laise, D.D.C., Civ. Act. No. 76-516, June 3, 1976, appeal filed sub nom. Emery v. Reinhardt, also cited by the appellant (Brief, p. 14), simply tracks Communist Party, having been decided by the same district court judge.

The Council's attempt to rely upon cases decided under the Civil Rights Act must fail. While the Supreme Court found a presumption in favor of the award of attorney fees in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) and Northcross v. Board of Education, 412 U.S. 427 (1973), both plaintiffs had successfully prosecuted their actions for injunctive relief. Moreover, the body of interpretive law that has been built up in the Civil Rights area cannot appropriately be transferred to the Freedom of Information Act area. A civil rights litigant has a heavy burden to bear in proving discrimination before he can obtain judicial relief. See e.g. Bradley v. Richmond School Board, 416 U.S. 699 (1974); Washington v. Davis, ____ U.S. ___, 44 L.W. 4789, June 3, 1976. Thus it is appropriate to shift to defendants the burden of proving that there are circumstances which mitigate against an award of attorneys' fees to one who obtains an injunction. On the other hand in a Freedom of Information Act suit the burden of proof is on the government to show that requested information is exempt from disclosure. 5 U.S.C. 552(a)(4)(B); Soucie v. David, 448 F.2d 1067, 1073 (C.A.D.C. 1971).

Further, an FOIA suit can be initiated without the customary requirements of standing or interest or injury. Since the Act is in so many ways unique, courts must construe Section 552(a)(4)(E) primarily on the basis of its language and legislative history, while giving due consideration also to what construction would best effectuate the basic purpose of the Act.

Nor can the Council rely upon Hall v. Cole, 412 U.S. 1, 13 (1973) (Brief, p. 15), wherein the Court indicated that disparity in resources between the litigant and his opponent may provide a justification for fee shifting. In Hall v. Cole the fee was awarded on the basis of the equitable "common fund" doctrine against a labor union; that doctrine has no applicability here. FOIA fee awards must be governed strictly by statute since the defendants are federal officials acting in an official capacity. See 28 U.S.C. 2412; Alyeska v. Wilderness Society, supra, 421 U.S. at 265-268.

While the courts might be justified in taking economic factors into consideration in determining whether to make a discretionary award of fees to an eligible recipient, such factors are not determinative in deciding whether a compromising litigant is a "prevailing party" so as to qualify for fees and costs under Section 552(a)(4)(E).

D. The Council attempts to show in point C of its brief that, despite the district court's finding to the contrary, the Department of Labor's release of the requested documents would not have come about but for this action. The Council attacks the credibility of the government's affidavits, and further asserts that those affidavits do not support the inferences drawn by the ^{12/} court. (Brief, p. 16). However, the Council did not refute the facts stated in the affidavits in the court below, and does not refute them here. Moreover, the findings of the district court should not be set aside under Rule 52(a), F.R.Civ.P. unless they are shown to be "clearly erroneous", and the Rule embraces inferences drawn by the court. United States v. United States Gypsum Co., 333 U.S. 364, 393-395; United States v. Yellow Cab Co., 338 U.S. 338, 341-342.

E. Additionally, the Council maintains that the Department of Labor is precluded from claiming that its initial withholding of the documents had any "reasonable basis

^{12/} Additionally, the Council claims that the government had a burden of rebutting a presumed "inference" that the court suit caused the release of the documents (Brief, p. 16), but it cites no relevant law. The law which it does cite (5 U.S.C. 552(a)(4)(B), 552(a)(6)(B) and 552 (a)(6)(C)) merely stands for the proposition that when an FOIA action is brought and there is an in camera inspection of documents, the burden of proof is on the government to show that the documents are lawfully withheld. These sections are not relevant here.

13/

in law" because it subsequently admitted that the documents "were erroneously withheld on the basis of exemption 5 of the FOIA". (Brief, p. 17). This is nonsense. The Council's request shows on its face that the requested materials were potentially exempt under exemption 5. The Council requested:

All records, reports or documents prepared by Department of Labor "monitors" in connection with on-site evaluations of all Vermont apple growers' efforts to recruit domestic labor to pick the 1975 apple harvest (prepared at any time during the period May-July 1975). (A-21).

Exemption 5 exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency". 5 U.S.C. 552(b)(5)

For the benefit of its employees who must respond to FOIA requests the Department of Labor's regulations explain, 29 C.F.R. 70.25:

The exemption is intended to protect the full and frank exchange in writing of ideas, views, and opinions necessary for the effective functioning of the Government and the making of informed decisions by its officers.

13/ The Senate Report on the 1974 Amendments indicates that in exercising their discretion to determine whether to award attorney fees and costs to prevailing plaintiffs the courts should consider "whether the government's withholding of the records had a reasonable basis in law." (Leg. Hist. 171).

The section-by-section analysis explains: [A] court would not award fees where the government's withholding had a colorable basis in law but would ordinarily award them if the withholding appeared to be merely to avoid embarrassment or to frustrate the requester." (Ibid.)

As this Court pointed out in Title Guarantee Co.

v. National Labor Relations Board, supra, Slip op. n.15, this exemption has been construed to cover internal communications consisting of advice, recommendations and opinions, as well as other materials incorporating deliberative or policymaking processes. It may cover even purely factual or investigatory reports when those reports are "inextricably intertwined" with the deliberative or policymaking functions of the agency. Soucie v. David, 448 F.2d 1067, 1077-78 (C.A.D.C., 1971). See also Environmental Protection Agency v. Mink, 410 U.S. 73, 89-91 (1973); International Paper Co. v. E.P.A., 438 F.2d 1349, 1358-1359 (C.A. 2, 1971), certiorari denied, 404 U.S. 827 (1971); Montrose Chemical Corporation of California v. Train, 491 F.2d 63, 65-67 (C.A.D.C., 1974); Brockway v. Department of Air Force, 518 F.2d 1184, 1189-1190 (C.A. 8, 1975).

The Department of Labor's Regional Administrator believed that the reports sought fell within this exemption because they were "intra-agency memoranda containing data, views, and opinions necessary for the functioning of the government and the making of informed decisions by its officers" (A-22).

The Solicitor of Labor on appeal made no claim of exemptions under 5, but did delete the names of individuals making the reports under exemption 6, which pertains to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy". (A-66). However, this does not mean that the Department did not have at least a "colorable" claim of exemption under 5. Much

less does it show that the Regional Administrator withheld the documents "to avoid embarrassment or to frustrate the requester" (Note 13, supra) when he claimed that the materials were exempt under 5. And, in any event, the decision of the Solicitor of Labor became the final and relevant decision of the Department of Labor. The Council does not challenge the exemptions claimed by the Solicitor, thus evidently agreeing that the materials requested were at least partially exempt from disclosure.

Finally the Council implies that since the Department of Labor was late in producing the documents, it is guilty as a matter of law of a wrongful withholding. (Brief, p. 18). Significantly, the Council cites no legislative history in support of this position. It cannot because there is none. Instead the Council relies solely upon the district court's decision in Communist Party, which we maintain was wrongfully decided for the reasons set out above (pp. 19-23; 32-33). The government's mere delay in producing the documents should not make it liable for attorney's fees here where the relevant documents were voluntarily released through the agency's internal appeals procedure without a court order requiring their production, or any court determination that there had been a wrongful withholding. Under these circumstances the Council did not "substantially prevail" within the meaning of 5 U.S.C. 552(a)(4)(E).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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AUGUST 1976.

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Attorney.

A D D E N D U M

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1955

VIOLET DAVIS GRUBBS, Individually, and on behalf of all
persons similarly situated, APPELLANT

v.

EARL L. BUTZ, Individually, and as SECRETARY OF
AGRICULTURE, ET AL

On Motion for Attorneys' Fees
(D.C. Civil 875-73)

Filed July 26, 1976

Jane Lang McGrew, was on the pleadings for appellant.

Earl J. Silbert, United States Attorney, *John A. Terry*,
George A. Stohner and *Karen I. Ward*, Assistant United
States Attorneys, were on the pleadings for appellee.

Before: *BAZELON*, Chief Judge, *ROBINSON* and *MACKINNON*, Circuit Judges

Opinion for the Court filed by *Chief Judge BAZELON*.

Separate Statement filed by *Circuit Judge MACKINNON*,
concurring in the result.

BAZELON, Chief Judge: The sole question on this motion is whether appellant—who claims but has yet to prove that the Department of Agriculture discriminated against her in employment—is entitled to attorney's fees for services in a substantially successful interlocutory appeal.

On May 4, 1973, Ms. Grubbs instituted an action in the District Court pursuant to § 717(c) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16(c) (Supp. IV 1974), alleging that she had been the victim of sex discrimination by the Department of Agriculture and had been subjected to reprisals since her filing of a formal complaint with the Department almost two years earlier.¹ She sought and obtained a temporary restraining order, prohibiting the Department from continuing separate administrative proceedings on her allegations. The trial judge subsequently refused to grant her request for a preliminary injunction and ruled that she would "be required to exhaust her administrative remedies within the [Department]" before proceeding further in District Court. In *Grubbs v. Butz*, 514 F.2d 1323 (D.C.Cir. 1975), we affirmed the denial of the injunction, but ruled that no further exhaustion should have been required, that the court and the Department could exercise concurrent jurisdiction, and that the court could not rely on the record of administrative proceedings that were not completed prior to the filing of the civil action without giving Ms. Grubbs a full opportunity to present her own evidence in court. The effect of our decision was to allow Ms. Grubbs to "safely elect to concentrate her entire resources on the judicial proceedings."²

¹ For a more complete statement of the facts, see *Grubbs v. Butz*, 514 F.2d 1323 (D.C.Cir. 1975).

² *Id.* at 1330.

Ms. Grubbs now asserts that she is entitled to an award of attorney's fees as a "prevailing party" under § 706(k) of the Civil Rights Act of 1964,³ which was rendered applicable to employment discrimination actions against the federal government by § 717(d) of the Equal Employment Opportunity Act of 1972.⁴ Finding her claim premature, we deny it.

Most courts that have been called upon to construe the "prevailing party" provision have done so in cases in which the focus was on the propriety of awards to parties who had demonstrated discrimination by the defendant but were unable to prove that they were victims of it, or to parties who have sustained some but not all of their claims. Awards have been upheld in both of these situations.⁵ For the purposes of this motion, we assume

³ Pub.L. 88-352, 42 U.S.C. § 2000e-5(k) (1970) provides:

In any action or proceeding under this subchapter, the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

⁴ Pub.L. 42-261, 42 U.S.C. § 2000e-16(d) (Supp. IV 1974) provides that, "The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder."

⁵ See, e.g., Rosenfield v. Southern Pacific Co., 519 F.2d 527, 529 (9th Cir. 1975); Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975); Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971); Parham v. Southern Bell, 433 F.2d 421 (8th Cir. 1970).

A few courts, without discussion, have allowed interim fee awards under § 706(k), prior to findings of discrimination. See Malone v. North American Rockwell Corp., 457 F.2d 779, 781 (9th Cir. 1972); Green v. McDonnell Douglas Corp., 463 F.2d 337, 344 (8th Cir. 1972), vacated and remanded on other grounds, 411 U.S. 792 (1973). But cf. Young v. ITT, 56 F.R.D. 7 (E.D.Pa. 1972) (denying fees for interlocutory

that despite her failure to obtain injunctive relief, Ms. Grubbs "prevailed" on the interlocutory appeal. The more troubling question remains—whether her success on that interlocutory appeal qualifies her as a "prevailing party" within the meaning of the statute.

The statute, however, does not define "prevailing party." Scant attention was focused on the attorney's fee provision amid the sound and fury of the extended debates on the 1964 Civil Rights Act. No counsel fee provision was included in the version of Title VII reported out of the House Judiciary Committee,¹ or that initially approved by the House of Representatives and submitted to the Senate.² The provision first appeared in Title VII as part of a comprehensive amendment in the nature

appeal under 42 U.S.C. § 1981). In *Womack v. Lynn*, No. 72-1827 (D.C.Cir., Order of Nov. 22, 1974), this court, in an unpublished order, directed the district court to award attorney's fees to a plaintiff who, on appeal, had won the right to amend his complaint to add a Title VII claim and had won reversal of a grant of summary judgment in favor of defendant.

We have found only one case in which the propriety of an award of fees prior to a decision on the merits has been discussed. In *Van Hoomisen v. Xerox Corp.*, 503 F.2d 1131 (9th Cir. 1974), the defendant was awarded attorney's fees after the EEOC appealed unsuccessfully from an order granting it leave to intervene in support of plaintiff's claim of discriminatory firing, but denying it permission to add to the case a claim of discriminatory hiring practices. Read broadly, *Van Hoomisen* approves fee awards in connection with "significant and discrete" interlocutory appeals, *see id.* at 1132; read narrowly, it approves awards only when an interlocutory appeal results in a final resolution of a separable dispute (the claim of discriminatory hiring).

¹ H.R. Rep. No. 914, 88th Cong. 1st Sess. (1963).

² For a section by section analysis of Title VII of H.R. 7152 as approved by the House, see 110 Cong.Rec. 16001-004. The Senate debated the House bill without first referring it to a Committee. *Id.* at 6416-17.

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of a substitute, submitted by Senators Mansfield and Dirksen.⁸ That comprehensive amendment was approved by the Senate⁹ and later adopted in toto by the House.¹⁰

From the Senate debate on the Mansfield-Dirksen amendment, however, two purposes for § 706(k) emerge. First, Congress desired to "make it easier for a plaintiff of limited means to bring a meritorious suit," as Senator Humphrey stated in explaining the changes made by the amendment.¹¹ Indeed, the attorneys' fee provision was an integral part of the Senate's effort to shift primary responsibility for enforcing Title VII from the EEOC to aggrieved individuals.¹² But second, and equally important, Congress intended to "deter the bringing of law-suits without foundation" by providing that the "prevailing party"—be it plaintiff or defendant—could obtain legal fees.¹³ Were this not Congress' intent, it would have

⁸ *Id.* at 11926-11935; *see id.* at 11897.

⁹ *Id.* at 14239; *see id.* at 14511.

¹⁰ *Id.* at 15869.

¹¹ *Id.* at 12724. In *Newman v. Piggie Park*, 390 U.S. 400, 401-02 (1968), the Supreme Court found that an identical attorneys' fees provision in Title II of the 1964 Civil Rights Act was intended to "encourage individuals injured by discrimination to seek judicial relief." The *Piggie Park* rationale has been found applicable to Title VII cases as well. *See, e.g., Evans v. Sheraton Park Hotel*, 503 F.2d 177, 189 (D.C.Cir. 1974); *Lea v. Cone Mills Corp.*, *supra* note 5, at 88; Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U.L.REV. 301, 321-22 (1973) (collecting cases).

¹² Vaas, *Title VII: Legislative History*, 7 B.C.IND. & COM. L.REV. 431, 453 (1966).

¹³ 110 Cong.Rec. 13668-69 (remarks of Senator Lausche); *cf. id.* at 14214 (remarks of Senator Pastore) (making same point regarding Title II attorneys' fees provisions).

In 1972 the Senate, as part of the Equal Employment Opportunity Act of 1972, adopted an amendment to § 706(k)

authorized fees only to prevailing plaintiffs, or to "any party" as it has done in many other instances.¹⁴

that would have required that small businesses and unions that prevailed in Title VII actions brought by the EEOC or the United States be indemnified for their attorneys' fees. 113 Cong.Rec. 1847 (1972); see *id.* at 670-71, 1841-47 (debate). The Senate receded from its amendment in conference. S.Rep. No. 92-381, 92nd Cong., 2d Sess., at 19 (1972).

¹⁴ For federal statutes authorizing or mandating awards of attorneys' fees only to prevailing plaintiffs, see, e.g., Privacy Act, 5 U.S.C. § 552a(g)(2)(B) (Supp. IV 1974) (fees if "complainant has substantially prevailed"); Packers and Stockyards Act, 7 *id.* § 210(f) (1970) (if "petitioner finally prevails"); Clayton Act, 15 *id.* § 15 (persons injured "shall recover" fees); Truth in Lending Act, 15 *id.* § 1640(a) (fees in "successful action"); Fair Labor Standards Act, 29 *id.* § 216(b) ("in addition to any judgment awarded to the plaintiff"); Fair Housing Act of 1968, 42 *id.* § 3612(c) (to "prevailing plaintiff"); Communications Act of 1934, 47 *id.* § 206 ("in every case of recovery"). For statutes authorizing awards to any party, see, e.g., Trust Indenture Act, 15 *id.* § 77www(a); Securities Exchange Act of 1934, 15 *id.* §§ 78i(e), 78r(a); Water Pollution Prevention and Control Act, 33 *id.* § 1365(d); Clean Air Amendments of 1970, 42 *id.* § 1857h-2(d); Noise Control Act of 1972, 42 *id.* § 4911(d) (Supp. IV 1974). For a comprehensive list of federal attorneys' fees statutes, see *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 260-61 n.33 (1974); many of the statutes are reprinted in *Hearings on the Effect of Legal Fees on the Adequacy of Representation Before the Subcomm. on Representation of Citizens Interests of the Senate Comm. on the Judiciary*, 93rd Cong., 1st Sess. pt.3, at 1266-78 (1973).

In 1971 the House Education and Labor Committee reported a bill, eventually to become the Equal Employment Opportunity Act of 1972, that would have amended § 706(k) to allow only "prevailing plaintiffs" to be granted fee awards. H.Rep.No. 92-238, 92nd Cong., 1st Sess., at 32 (1971). The Committee version, however, was replaced on the House floor by a comprehensive amendment in the nature of a substitute that made no change in § 706(k), 117 Cong.Rec. 31979-80,

Since Congress was solicitous enough of the rights of innocent Title VII defendants to authorize awards of attorneys' fees in their favor, we cannot believe Congress would have countenanced assessing fees against a defendant absent any showing of discrimination.¹⁵ For all we now know, the defendants in this case may be entirely blameless. If attorneys' fees were assessed against them at this point in the litigation, the ultimately successful party might end up having subsidized a large segment of the losing party's suit against him. While that prospect might be consonant with the goals of a statute authorizing fee awards to any party,¹⁶ we find it contrary to the purposes of one that provides for awards only to the party who prevails.¹⁷ It follows that since Ms. Grubbs

32110-13 (1971), and the House did not debate this difference between the Committee and substitute bills.

¹⁵ It might be argued that since § 706(k) precludes the United States from recovering attorneys' fees, Congress' concern for innocent defendants extended only to private companies and unions. However, the provision barring fee awards to the United States was adopted in 1964 when the United States could be only a plaintiff in a Title VII case, and it is at least uncertain whether § 706(k) bars an award in favor of a head of an agency, department or unit, the only proper defendant in a Title VII action brought by a federal employee, *see* 42 U.S.C. § 2000e-16(c) (Supp. IV 1974). Nor is there anything else in the language of the statute or in the legislative history that indicates that Congress was unconcerned with deterring nonmeritorious suits against federal defendants, although the history of the 1972 Act, *see* note 13 *supra*, indicates that the Senate was more concerned with protecting small employees and unions.

¹⁶ *See* note 14 *supra*.

¹⁷ Our interpretation of "prevailing party" is consistent with the interpretation that the phrase has been given when used in other costs or fees statutes. *See*, e.g., 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2667 (1972) (discussing construction of "prevailing party" in F.R.Civ.P. 54(b)).

has yet to demonstrate discrimination, an award of counsel fees would be inappropriate at this time.

In reaching this conclusion, we in no way imply that an interim fee award would be inappropriate if the losing party had "acted in bad faith, vexatiously, wantonly, or for oppressive reasons. . . ." ¹⁸ Nor do we denigrate the propriety of an interim award once discrimination has been established. As Justice Blackmun wrote for a unanimous Court in *Bradley v. School Board of City of Richmond*, courts "must have discretion to award fees and costs incident to the final disposition of interim matters." ¹⁹

Ms. Grubbs has won a significant procedural victory, simplifying the path that victims of discrimination by Government agencies must follow to vindicate their Title VII rights. If Ms. Grubbs succeeds in proving discrimination, the work for which she now claims fees would then be compensable and the magnitude of the procedural victory would be a factor in determining the extent of

¹⁸ Alyeska Pipeline Co. v. Wilderness Society, *supra* note 14, at 253-59, quoting *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974). This well-established exception to the traditional rule barring attorneys' fees has been liberally construed in civil rights cases. See Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV.L.REV. 849, 893-94 (1975).

¹⁹ 416 U.S. 696, 723 (1974); see *Patterson v. American Tobacco Co.*, 9 EPD ¶ 10,039 (E.D.Va. 1975). Appellant's reliance on *Bradley* to support a fee award prior to a finding of discrimination in this case is misplaced. The statute in *Bradley*, 20 U.S.C. § 1617 (Supp. IV 1974) provided for an award of fees "[u]pon the entry of a final order," a term of art not synonymous with an adjudication on the merits. In contrast, § 706(k) simply states that fees may be awarded to the "prevailing party," a term of art that more nearly suggests that there will be but a single prevailing party.

that compensation.²⁰ She must, however, move closer to the end of this litigation before an award is appropriate.

Motion denied.

²⁰ See *Evans v. Sheraton Park Hotel*, *supra* note 12, at 187-88 ("results obtained" one factor to be considered in fixing amount of attorneys' fees).

MACKINNON, *Circuit Judge*, concurring: I concur in the result and that portion of the opinion that is relevant to the result, but I do not concur in the dicta.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONWIDE BUILDING MAINTENANCE, Inc.

v.

Civil No. 75-1511

ARTHUR SAMPSON, et al.

FILED

MAR 15 1976

ORDER

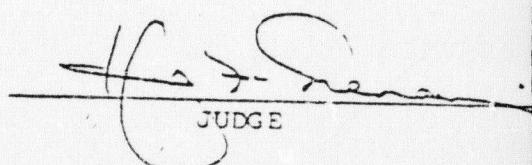
JAMES E. DAVEY, CLERK

Upon consideration of plaintiff's motion for summary judgment, defendants' motion for summary judgment or, in the alternative, to dismiss, the opposition thereto, the memoranda in support thereof and in opposition thereto, the entire record herein, and the parties having been heard and considered in the premises it appears to the Court that (1) although defendants have failed to comply with the time requirements of the Freedom of Information Act, 5 U.S.C. §552 (6), the circumstances surrounding the withholding indicate that defendants acted in good faith and with due diligence and do not raise questions whether "agency personnel acted arbitrarily or capriciously with respect to the withholding," 5 U.S.C. §552 (4)(F); and that (2) plaintiff has not "substantially prevailed" by reason of this action and, therefore, is not entitled to assessment of reasonable attorney fees or other litigation costs against the United States, 5 U.S.C. §552 (4)(E).

It is, accordingly, by the Court this 15th/A day of March, 1976,

ORDERED that plaintiff's motion for summary judgment should be, and the same is hereby, denied. And it is further

ORDERED that defendants' motion for summary judgment should be, and the same is hereby, granted.


H. D. Greene
JUDGE

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1371

OPEN AMERICA, ET AL.

v.

THE WATERGATE SPECIAL PROSECUTION FORCE, ET AL.,
APPELLANTS

On Appellants' Motion for Stay

(D.C. Civil Action 76-0129)

Argued 27 April 1976

Decided 7 July 1976

Eloise E. Davis, with whom Leonard Schaitman, were
on the motion for appellants.

Allan B. Morrison, was on the motion for appellees.

Before: LEVENTHAL, MACKINNON and WILKEY, Cir-
cuit Judges.

Opinion for the Court filed by Circuit Judge WILKEY.

Opinion filed by Circuit Judge LEVENTHAL concurring
in the result.

WILKEY, *Circuit Judge*: Action in the District Court was brought to compel disclosure within certain specified time limits of information sought under the Freedom of Information Act (FOIA).¹ In contrast with previous Freedom of Information Act cases, this suit does not deal with an interpretation of any of the exemptions to disclosure, but with the question of the time within which any compliance with or denial of a request must be made, as set forth in the 1974 FOIA amendments.² Ultimate access to the records is not, and may never be, the issue; the issue is under what time constraints administrative agencies should be compelled to act by a court at the behest of an information seeker.

United States District Judge Aubrey Robinson granted plaintiffs motion under *Vaughn v. Rosen*³ to require detailed justification, itemization, and indexing of the documents within thirty days. Believing that the statutory interpretation urged by plaintiffs and upon which the District Judge acted is erroneous, we reverse.

I. THE STATUTORY INTERPRETATION ISSUE

A. Actions Taken by the Parties

Plaintiffs' request under the Freedom of Information Act was made on 10 October 1975 by identical letters to the Attorney General of the United States, the Director of the FBI, and others, demanding the production for inspection and copying of all documents and files relating to the role of the former Acting Director of the FBI, L. Patrick Gray, in any aspect of the so-called "Water-

¹ 5 U.S.C. § 552 (1970 & Supp. IV, 1974).

² Act of 21 November 1974, Pub. L. No. 93-502, § 1(c), 88 Stat. 1561, amending 5 U.S.C. § 552(a) (1970).

³ 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). See also *Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975).

gate affair." These letters admonished that "[f]ailure to reply to this request within the ten-day period provided by the Act will be treated as a denial of the request, and appeal will be sought."¹ Reply was made by the Director of the FBI on 5 November 1975, noting that the request had been received, and that on the day of receipt the FBI had 5,137 Freedom of Information Act requests on hand and was in various stages of completion on 1,084 of those cases.²

By letter of 12 November 1975 plaintiff Open America addressed an appeal to the "Appeals Officer, Freedom of Information Unit, Federal Bureau of Investigation," noting that "[i]f you do not act upon my request within 20 working days, I will deem our request denied."³ On reaching its proper destination this letter, too, was duly acknowledged, the reply pointing out that the request had been assigned its priority number and would be processed in due course. Without detailing further exchange of correspondence between plaintiffs and officials of the Justice Department, it is sufficient to note that the failure of the FBI to complete the processing of this request within the statutory time limits, as interpreted by the plaintiffs, resulted in the filing on 22 January 1976 of the action in the District Court seeking to compel the FBI to comply with or deny immediately plaintiffs' request.

¹ Memorandum in Support of Government's Motion for Stay Pending Appeal (Exhibit A). Plaintiffs' letter, signed by John F. Banzhaf, III, as Executive Director, and four other individuals as Directors, of Open America, states that "Open America, Inc., is a non-profit organization formed to undertake projects 'in the public interest,' and this request is part of such a project."

² *Id.* (Exhibit B).

³ *Id.* (Exhibit C). This was an incorrect address, as the Appeals Office is located within the Office of the Deputy Attorney General.

After plaintiffs obtained such an order, the Government defendants came to this court, seeking an immediate temporary stay of the District Court's order of 23 March 1976.¹ At oral argument all parties stated that they had no objection to the court considering this case on the merits, which we have done.²

B. Plaintiffs' Theory of the Case

At no time have plaintiffs specified the purpose for which they desire access to the FBI files on the role of L. Patrick Gray in the Watergate affair, nor indeed under the Freedom of Information Act are they required to do so. More important to the issue in this appeal, however, may be that at no time have plaintiffs specified any urgent or exceptional need for this information which entitles them to a priority over the other 5,137 applicants whose requests under the Freedom of Information Act were on file with the FBI on the date plaintiffs' request was received. Rather, plaintiffs have relied throughout on a claim of absolute right to

¹ This action originally named the Watergate Special Prosecution Force as the first defendant. Judge Robinson's order noted that this entity planned to file a detailed justification as to the two files in its possession requested by plaintiffs. Hence, plaintiffs' motion was granted only "as to Defendants Attorney General Levi, Director Kelley, Department of Justice and Federal Bureau of Investigation. . ." *Open America v. Watergate Special Prosecution Force*, Civil Action No. 76-0120 (D.D.C., order issued 23 Mar. 1976).

² The District Court's order is reviewable under 28 U.S.C. 1292(a) (1970). *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171-72 (1974). The order settled conclusively the position of the parties under 5 U.S.C. § 552(a)(6)(C) (1970), whose construction, in light of the circumstances in this and other cases, is too important to be denied review. The question of priorities should be decided now, not on an appeal from the Government's probable claim under exemptions to disclosure, when the issue of priorities might appear moot.

have their request processed within the statutory ten-day and twenty-day periods.⁹

It is apparent from the action of the District Judge on this matter that he adopted completely plaintiffs' theory of the case. He held no hearing, he made no findings of fact, he gave no reasons for his action in granting plaintiffs' motion; he simply issued an order for the defendant officials to deliver to plaintiffs within thirty days the documents agreed to be produced and a detailed justification for documents claimed to be exempted from disclosure under the FOIA. We accept these actions of the District Judge to mean that he agreed with plaintiffs' interpretation of the statute, and that in the spirit of expediting all Freedom of Information Act requests, he saw no reason to delay matters by holding a hearing or taking the time to make detailed findings of fact or to elaborate upon his reasons. If the matter were as simple as plaintiffs claim it to be, and as the District Judge appeared to assume, this was a sensible course of action.

C. The Statutory Language

This is a case of first impression. There are no previous judicial decisions interpreting 5 U.S.C. § 552(a) (6)(A), that portion of the 1974 amendments on which plaintiffs base their argument and on which the District Judge acted.¹⁰ We must therefore base our decision on the

⁹ 5 U.S.C. § 552(a)(6)(A). There is some indication that the individual plaintiffs, a law professor and students at a local law school, are desirous of making this a test case on subsection (a)(6)(A). Accordingly, they have not alleged any facts which would bolster their claim, preferring instead to rely on the bare words of the statute in an effort to secure a decision favorable to the meaning they ascribe to it.

¹⁰ Since issuance of the order in the instant case, two other federal district courts for the District of Columbia have in-

original Freedom of Information Act, the amendments of 1974, their legislative history, and the undisputed operative facts of this case, with scant resort to precedent.

Section 552(a) of Title 5, United States Code, was amended by adding:

(6)(A) Each agency, upon any request for records . . . shall—

(i) determine within ten [working] days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination

(ii) make a determination with respect to any appeal within twenty [working] days . . . after the receipt of such appeal.

These "administrative deadlines" of Section 552(a)(6)(A) are modified by the following subparagraph (B), which provides that in "unusual circumstances," for example where the request involves voluminous records, or records must be obtained from field office or storage, the total time limits may be extended for an additional ten working days. Thereafter, an applicant who has not received either the information requested or denial of his request will be deemed to have exhausted his administrative remedies (subparagraph (C)), and may then bring suit in the appropriate district court pursuant to Section 552(a)(4)(B).

The specific language of the 1974 amendments on which the Government relies appears in 5 U.S.C. § 552(a)(6)(C): "If the Government can show exceptional

interpreted section 552(a)(6)(A), (along with subparagraph (C)) and reached opposite conclusions. Compare *Hayden v. United States Dep't of Justice*, Civil Action No. 76-0288 (D.D.C., 21 May 1976) (Bryant, J.), with *Cleaver v. Kelley*, Civil Action No. 795-76 (D.D.C., 27 May 1976) (Green, J.).

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circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records."

II. PRESENT FBI PROCEDURES COMPARED TO THE STATUTE

The Government defense, simply put, is that the FBI has indeed exercised "due diligence" in handling all informational requests, including this one, but that "exceptional circumstances" created by a virtual deluge of requests since the effective date of the FOIA amendments have prevented the agency from completing its review of the records sought by these and other applicants. Thus, defendants assert, under such circumstances Congress intended for the courts to utilize the authority granted them by subsection (6)(C) to relieve agencies of the burden of complying with the very strict statutory time limitations in subsection (6)(A). The "exceptional circumstances" provision was designed and inserted specifically as a safety valve for the new statute.

A. *"Exceptional Circumstances"*

Subparagraphs (B) and (C) of Section 552(a)(6) both contain escape valves of a sort. (B) refers to "unusual circumstances," but only such unusual circumstances as are specified in this subparagraph will suffice for a ten-day extension of the limits of subparagraph (A). Those unusual circumstances are the need to collect the records from several separate places, voluminous records called for in the single request, and a need for consultation with other agencies. The ten-day extension is granted by the agency to itself, but only on notice to the requesting party.

The "exceptional circumstances" of subparagraph (C) are something different. "If the Government can show exceptional circumstances exist and that the agency is

exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records." This was put in as a safety valve after the protests of the administration that the rigid limits of subparagraphs (A) and (B) might prove unworkable.¹¹ Subparagraph

"The Senate Report on the 1974 FOIA amendments explains,

[T]he time limits set in section [552(a)(6)] will mark the exhaustion of administrative remedies, allowing the filing of lawsuits after a specified period of time, even if the agency has not yet reached a determination whether to release the information requested. Where there are "exceptional circumstances," the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Such "exceptional circumstances" will not be found where the agency had not, during the period before administrative remedies had been exhausted, committed all appropriate and available personnel to the review and deliberation process. This final court-supervised extension of time is to be allowed where the agency is clearly making a diligent, good-faith effort to complete its review of requested records but could not practically meet the time deadlines set

JOINT COMM. PRINT, FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P.L. 93-502), 91st Cong., 1st Sess. 178 (1973) (hereinafter "LEG. HIST."). Both subsections (a)(6)(B) and (a)(6)(C), which initially appeared only in the Senate version of the bill, were included in the final conference bill (the version enacted) in an effort to meet objections raised by the administration to the strict time limitations of subsection (a)(6)(A). President Ford had advised the conferees that he

"believe[d] that the time limits for agency action [were] unnecessarily restrictive in that they fail[ed] to recognize several valid examples of where providing flexibility in several specific instances would permit more carefully considered decisions in special cases without compromising the principle of timely implementation of the Act."

LEG. HIST. at 880.

(C) obviously contemplates (1) that the agency will have found it impossible to respond to a request within the time limits specified, even with all due diligence, and for reasons not confined to those listed in subparagraph

The Conference Chairmen, Senator Kennedy and Congressman Moorhead, sent the following reply to the President:

You . . . suggest that the time limits in the amendments may be unnecessarily restrictive. The conference adopted at the first meeting the Senate language allowing agencies an additional ten days to respond to a request or determine an appeal in unusual circumstances. Pursuant to your suggestion we included language from the Senate version making clear that a court can give an agency additional time to review requested materials in exceptional circumstances where the agency has exercised due diligence but still could not meet the statutory deadlines.

LEGIS. HIST. at 382.

The president vetoed the bill, stating in his veto message a concern that, given the amendment's time frame, law enforcement agencies would be so overburdened with the review of FOIA requests that they could not effectively perform their law enforcement duties:

. . . I believe that confidentiality would not be maintained if many millions of pages of FBI and other investigatory law enforcement files would be subject to compulsory disclosure at the behest of any person unless the Government could prove to a court—separately for each paragraph of each document—that disclosure “would” cause a type of harm specified in the amendment. Our law enforcement agencies do not have, and could not obtain, the large number of trained and knowledgeable personnel that would be needed to make such a line-by-line examination of information requests that sometimes involve hundreds of thousands of documents, within the time constraints added to current law by this bill.

Therefore, I propose that more flexible criteria govern the responses to requests for particularly lengthy investigatory records to mitigate the burden which these amend-

ments would otherwise impose, in order not to dilute the primary responsibilities of these law enforcement activities.

Legis. Hist. at 484.

Senator Kennedy, a sponsor of the 1974 amendments, explained in the Senate debate following the veto that subsection (a) (6) (C) was designed to provide an "escape valve" for agencies that are diligently trying to review requested materials, but are unable, because of "exceptional circumstances," to complete their work before a complaint is filed in district court:

[T]here is the issue of time limits. Our bill provides an agency 10 working days to respond initially to a request for information, 20 working days on appeal, and an additional 10 working days where unusual circumstances are present. That gives the agency 40 working days, or almost two calendar months—more than enough time for any agency to complete the process of finding and reviewing requested documents.

If a person sues the agency after that time, and the agency is still diligently trying to complete review of the materials under exceptional circumstances, then we have another escape valve in the bill—added by specific request of the administration during our conference. The agency may ask for, and the court is authorized to grant, additional time pending completion of such review.

Legis. Hist. at 438-39. Similarly, Senator Bayh, another sponsor of the bill, explained,

[T]he bill permits a court in exceptional circumstances to delay its review of a case until an agency has had sufficient time to review its records. In other words, after the 2 months of administrative deadlines have lapsed and after a complaint has been filed with the court, the court still has the discretion to grant the agency more time if exceptional circumstances warrant. These provisions more than adequately satisfy the President's concern for flexibility.

Legis. Hist. at 471. During the post-veto debates on the other side of Capitol Hill, Congressman Moorhead also alluded to the "safety valve" aspect of subsection (a) (6) (C):

[Continued]

(B);¹² (2) that the requesting party will have gone to court; and (3) that the court will hear evidence (a) as to what "exceptional circumstances" may excuse the Government from the rigid time limits of subparagraphs (A) and (B), and (b) as to the "due diligence" of the agency, if that is challenged by plaintiff.

That such safety valve might well have been contemplated and is presently needed is evidenced by the fact that Congress appropriated no additional resources whatsoever for implementation of the 1974 FOIA amendments, but instead contemplated that any additional costs could be absorbed within the operating budgets of the agencies. The House Committee on Government Operations estimated the total additional cost of the FOIA amendments for all agencies at \$50,000 for 1974 and \$100,000 for each of the succeeding five years.¹³ The

¹² [Continued]

... Mr. Speaker, we . . . include language requested by the President in his August 20 letter to the conference committee [quoted in part *supra*] to authorize the courts to grant a Federal agency additional time to respond to a request under the Freedom of Information Act if the agency is "exercising due diligence in responding to the request." Here again the veto message ignores specific language already included in the bill.

LEGIS. HIST. at 407.

¹³ We do not rule out the possibility that an extraordinary factor or a combination of reasons listed in (6)(B) might constitute "exceptional circumstances" under (6)(C). (B) is a safety valve for the agency and is limited in time and cause; (C) is a safety valve to be opened only by a court after an objective evaluation of the exceptional circumstances and a showing of due diligence by the agency. As previously noted, two federal district courts for the District of Columbia have reached opposite conclusions on the meaning of "exceptional circumstances." Compare *Harden v. United States Dep't of Justice*, Civil Action No. 76-0288 (D.D.C., 21 May 1976) (Bryant, J.), with *Cleaver v. Kelley*, Civil Action No. 795-76 (D.D.C., 27 May 1976) (Green, J.).

¹⁴ LEG. HIST. at 130.

cloudy state of the Congressional crystal ball is demonstrated by an FBI official's affidavit filed in these proceedings: "[The FBI's] actual cost for implementation of the FOIA in Fiscal year 1974 was \$100,000. In Fiscal year 1975 it jumped to \$462,000 and for the Fiscal year 1976 we have estimated the cost to be \$2,675,000. For Fiscal year 1977, we have estimated the cost for the FOIA to be the same, \$2,675,000, plus an additional \$725,000 for the Privacy Act of 1974."¹¹

If Congress' anticipation of the burden thrust upon all agencies by its 1974 FOIA amendments is to be taken as a measuring stick, then surely the demands placed on this one agency by Congress' action may reasonably be viewed as "exceptional circumstances."

B. "Due Diligence"

Whether the FBI has been exercising "due diligence" requires a short look at its present procedure for processing FOIA requests. Upon receipt of a request, the search begins with the FBI Central Records System of 58 million index cards of subjects and individuals. Examination of the index files often reveals other files in which requested information may be located. Photographic copies of entire file sections are made on which to mark deletions or exemptions as necessary. Personnel with experience in the area of the requested information then make a line by line reading of the files to determine which portions can be disclosed and which can be kept confidential under one of the nine exemptions to the Freedom of Information Act. The material is then subject to a higher review to see if matter which is legally exempt can still be disclosed without having to.

¹¹ Affidavit of John E. Howard, Special Agent, Federal Bureau of Investigation, at 4, Memorandum in Support of Government's Motion for a Stay Pending Appeal (Attachment B).

inter alia, confidential sources, privacy of individuals, classified data, etc. The series of reviews culminate in a decision over the FBI Director's signature.

To expedite this necessarily tedious process, requests are separated into difficult and simple requests, identified respectively as "project requests" or "non-project requests." Project requests customarily involve handling thousands of pages of documentary materials. Open America's request is so classified.

A project request is assigned to a project team, headed by a supervisory special agent, including five research analysts, and at least two research clerks. The particular team to which Open America's request has been assigned is in various stages of processing 33 other projects, all of which were received prior to Open America's request. One of the complications in this particular search is that the name of L. Patrick Gray was not indexed in connection with documents filed, since he was Acting Director of the Bureau and his name would have appeared on virtually every file during his tenure. So far over 38,000 pages have been located which the team supervisor believes should be carefully reviewed; 9,800 pages are directly relevant to the Watergate investigation and Mr. Gray's confirmation hearings. It is estimated that a little over half the job has been done and that review will be completed by around the first of August 1976, with any appeal to be completed within three additional months.

One hundred ninety-one employees at FBI Headquarters alone are assigned solely to the processing of FOIA requests. At the time of Open America's request there was a total backlog of 5,137 requests, some project and some non-project. While the "two-track" system expedites simple requests and identifies those matters which will be more difficult and time-consuming, on each track the FBI attempts to proceed on a strictly first-in, first-

out basis and to maintain approximately the same rate of progress. This, in itself, creates difficult personnel allocation problems, but things may be further complicated by the need to reappportion personnel to comply with court orders in cases of genuine need.¹³

¹³ We know of two such cases presently being expedited under court orders. In a suit brought in the United States District Court for the District of Columbia by Michael Meeropol, son of Julius and Ethel Rosenberg, seeking documents related to his parents' trial and execution, Judge Green gave the Department of Justice less than three months to process plaintiff's request. *Meeropol v. Levi*, Civil Action No. 75-1121 (D.D.C., order issued 27 Aug. 1975). According to the Government, "In order to comply with the court's order 65 full-time and 21 part-time employees were assigned solely to this case. This number represented over one third of the personnel then assigned to the FOIA Section and required the diversion of some employees from non-project work to the Project Unit." Supplemental Memorandum for the Government Appellants at 5.

Also, in *Fellner v. Levi*, Civil Action No. 75-C-430 (W.D. Wis., order issued 17 Dec. 1975), a suit involving the request of an independent newspaper editor for materials relating to the actions of numerous individuals and dissident groups from 1966 to date, Judge Doyle of the Western District of Wisconsin ordered the FBI to review a minimum of 4,000 pages per month until plaintiff's request was processed. The Government informs us that "[i]n order to comply with the court's order the FBI has assigned three Research Analysts and three Research Assistants to work full-time on Mr. Bureau of Investigation, at 4. Memorandum in Support of Fellner's request." Supplemental Memorandum for the Government Appellants at 5 (footnote omitted).

Judge Doyle's order also required the Bureau to process plaintiff's request in piecemeal fashion, i.e., to depart from its normal procedure of processing and disclosing all relevant documents at one time. While it is difficult to determine whether the court-ordered method of piecemeal review is more or less efficient than the FBI's normal procedure, we can understand the administrative problems and inefficiencies created by a departure from standard routines. In a supplemental memorandum after oral argument, the Government

Absent a court order, only three out of some 900 cases closed to date have been accorded "preferential handling" by being processed out of their normal chronological sequence. All three cases involved information needed in connection with pending litigation where time was of the essence.¹⁶

described one administrative pitfall of piecemeal review already encountered by the FBI:

[Although, t]he Fellner request lends itself more readily to piecemeal disclosure than would Open America's request because it involves 25 individuals, 9 organizations, and 6 events, which can to some extent be researched separately. . . . even here the FBI has found the piecemeal operation unsatisfactory because authorizations for the release of information pertaining to the 25 third parties have been received sporadically from Mr. Fellner. This has presented a special problem for the analyst because files which have been once reviewed and have had names deleted have had to be re-reviewed so that those names can be restored consistent with subsequently received authorizations. Similar problems would of course be encountered wherever policy changes in connection with claimed exemptions occurred in the course of reviewing a given file.

Id. at 5-6 n. 2.

¹⁶ In its supplemental memorandum the Government described the circumstances surrounding these three cases as follows:

The first case involved a request for information by an accounting firm needed to defend itself in a civil suit brought by a contractor. The Department of Justice had previously investigated the contractor and his dealings with government contracting officials, and had initiated False Claims Act and criminal charges which were dropped without prosecution. The FOIA Unit was persuaded that the accounting firm's need for the documents was genuine, and the firm was willing to sharply curtail its request so as to limit it to a few documents which could be readily identified. On this basis expedition of the appeal was approved and the documents were released.

[Continued]

¹⁰ [Continued]

The second case also involved imminent private litigation. The requester claimed that the opposing party to the suit had maliciously alleged to the FBI that he (the requester) had fraudulently concealed assets in the course of obtaining a discharge in bankruptcy. Again the situation was such that if the Department's decision was to be of any assistance to the requester time was of the essence. Accordingly, the handling of the appeal was expedited. However, the appeal was adjudicated adversely to the requester on the merits.

The third case has been assigned for expedited processing but has not yet been finally reviewed. The appeal was filed by a member of Congress in the interest of his constituents.¹ The request relates to a document affecting title to thousands of acres of land involved in civil litigation in which the protagonists are farmers living on the land on the one hand and an Indian tribe claiming entitlement to it on the other. The Congressman advised the Department through his staff members that tempers in the community were getting short, and that he wished to assume an affirmative role in quieting the dispute in the interest of avoiding possible bloodshed. He believed that access to the document in question would assist him in his conciliatory efforts. Expedition of the administrative appeal was approved on the basis of these representations.

There have been numerous other requests for preferential handling. However, to the knowledge or recollection of the persons handling FOIA Appeals, these have been the only appeals processed on an expedited basis. Deputy Attorney General Tyler has thus almost invariably insisted upon strict adherence to the "first-in first-assigned" procedure for the processing of FOIA requests both initially and on appeal. . . .

¹ Requests and appeals filed by members of Congress seeking records pertaining to themselves are regarded as having been filed by private citizens and are not given expedited consideration.

Supplemental Memorandum for the Government Appellants at 9-10.

III. COURT AND AGENCY EXPEDITION PROCEDURE UNDER THE FREEDOM OF INFORMATION ACT

In determining for courts and agencies what should be the proper procedure for expediting information requests under the Freedom of Information Act, we must evaluate, in light of the objectives of the Act, the conflicting interests which will be affected by the procedure adopted.

The real parties at interest here may not be the Attorney General and the Director of the FBI at all, but the 5,137 other persons or organizations who made requests prior to plaintiff Open America. We have no doubt that the Government officials would comply promptly and faithfully with any order this court issued giving preferential, expedited treatment to the request of Open America. They would, of course, given their finite human and financial resources, do so by taking personnel away from other prior requests which the FBI is now engaged in processing.

We do not see, either on the face of the statute or on any sane analysis of the situation confronting the FBI and all other Government agencies in regard to Freedom of Information Act requests, why we should order such a reallocation of resources. Plaintiffs have alleged no urgency, have alleged no exceptional need, for the information they seek. Indeed, at oral argument counsel for plaintiffs was commendably frank in stating that the action of the District Court could not be defended on the ground of urgency or exceptional need, for the District Court made no such findings.

While neither we nor the District Court have undertaken examination of the fairness and efficiency of the FBI procedures, neither have we been asked to do so. There is no allegation by plaintiffs that the FBI procedure, treating each request on a first-in, first-out basis after initially separating the requests into the simple

and the difficult tasks for appropriate processing, is anything but fair, orderly, and the most efficient procedure which can be adopted under the circumstances. There is no allegation that the FBI has failed to allocate an appropriate number of personnel for the processing of Freedom of Information Act requests, given its present budgetary limitations set by Congress.

Plaintiffs' argument, and the District Court's decision, rests completely on the theory that after a request is made, appealed, and denied, then on the face of the statute the applicant can go to court and secure, without further allegation or proof, an order placing him at the head of the line at the administrative agency. We conclude that this is not enough.

If this were enough, even those with the dimmest of eyesight could look ahead a few months and see that the regulation of priorities in all agencies, not just the FBI, would very shortly become the function of the courts. If everyone could go to court when his request had not been processed within thirty days, and by filing a court action automatically go to the head of the line at the agency, we would soon have a listing based on priority in filing lawsuits, i.e., first into court, first out of the agency. This would be nothing but an inflation of a simple administrative request to a United States district court action, and like inflation in the monetary world would ultimately profit no one, since no one would be assigned a priority position any different than he would achieve if all applicants were left to the priorities fixed by the agency.

Of course, some would be content to have their curiosity satisfied in six to nine months, but surely others with a desire equal to the plaintiffs here would not have the financial resources to hire a lawyer and go to court, which would create a further invidious and unintended distinction.

We do not think that Congress intended, by fixing a time limitation on agency action and according a right to bring suit when the applicant has not been satisfied within the time limits, to grant an automatic preference by the mere action of filing a case in United States district court. Because the pernicious results of such an interpretation are so blatantly obvious—certainly under the "exceptional circumstances" which have materialized since passage of the 1974 amendments—we refuse to attribute such dim vision to the Congress.

We believe that Congress intended for a district court to require an agency to give priority to a request for information if some exceptional need or urgency attached to the request justified putting it ahead of all other requests received by the same agency prior thereto. This is, of course, on the assumption that the agency can be shown to be exercising due diligence. In this case we believe such a showing of due diligence has been made by the affidavits, and, indeed, no lack of *overall* diligence in handling the thousands of requests has been alleged by plaintiffs.

Further, the interests of those who have a real need and urgency for the information, and who have been previously able to go to court and get their requests satisfied after making a showing of their need and urgency, would be frustrated and vitiated by the interpretation urged by plaintiffs here. If *any* request for information can be the subject of a court order to the agency to place the request in a priority position, without any showing in court of urgency or exceptional need, then these court-ordered cases will take their places along with those court-ordered cases in which genuine urgency and need have been shown. The result will be that not only similar, prior, non-urgent requests will be displaced; even those requests with an urgent need will be unable to get to the head of the line, because of the crowd of mis-

cellaneous requests already placed there by court order without any showing of urgency or need whatsoever.

We believe that Congress intended to guarantee access to Government agency documents on an equal and fair basis. Good faith and due diligence call for a procedure which is fair overall in the particular agency. We believe also that Congress wished to reserve the role of the courts for two occasions, (1) when the agency was not showing due diligence in processing plaintiff's individual request or was lax overall in meeting its obligations under the Act with all available resources," and (2) when plaintiff can show a genuine need and reason for urgency in gaining access to Government records ahead of prior applicants for information. The role of the courts in achieving both of these objectives would be totally jeopardized by the interpretation of the statute urged by plaintiffs here.

In summary, we interpret Section 552(a)(6)(C) to mean that "exceptional circumstances exist" when an agency, like the FBI here, is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A), and when the agency can show that it "is exercising due diligence" in processing the requests. In such situation, in the language of subsection (6)(C), "the court may retain jurisdiction."

"The fulfillment of the objectives of the Freedom of Information Act is a matter in which Congress has shown keen interest and exercised continuous oversight. If the speed of replying to requests in any agency is not satisfactory to Congress, and the obvious cause is a lack of available resources considering the agency's other primary functions, the equally obvious remedy is for Congress to supply the necessary resources and to designate their use for FOIA purposes. We express no opinion as to whether the initiative here should come from the agency or Congress.

tion and allow the agency additional time to complete its review of the records." Under the circumstances defined above the time limits prescribed by Congress in subsection (6) (A) become not mandatory but directory. The good faith effort and due diligence of the agency to comply with all lawful demands under the Freedom of Information Act in as short a time as is possible by assigning all requests on a first-in, first-out basis, except those where exceptional need or urgency is shown, is compliance with the Act. The order of the District Court is therefore vacated and the case remanded for such action under the statute as is consistent with this opinion.

So ordered.

LEVENTHAL, Circuit Judge, concurring in the result:
At stake in this case is the right of applicants—here, Open America—to have the Department of Justice process information requests in accordance with Freedom of Information Act (FOIA) requirements, and the definition and enforcement of that right. The Justice Department has protested to Congress about the difficulty of meeting the FOIA's new time limits on administrative processing of requests under the Act; failing to get

¹ See, e.g., letter from Deputy Atty Gen. Harold Tyler to the Hon. Bella Abzug, Chairwoman, Government Information & Individual Rights Subcommittee, Committee on Government Operations, Mar. 15, 1976:

One of the provisions in the amendments to the Act that certainly has not worked out as anyone intended is the imposition of very short time limits for the processing of requests. I fully understand and accept the desire of Congress to demonstrate the importance it attached to the reasonably expeditious processing of requests for access to records. In my opinion, however, any time limit that does not take into consideration the number and complexity of the records within the scope of the individual request is both unrealistic and wholly unworkable.

* * * * *

There is one additional serious problem I desire to bring to your specific attention. That is the situation created by those cases in which we are sued before the administrative review process has been completed. Although the number of such cases is not particularly great, this unfortunate provision in the Act usually results in the individual who has sued receiving preferential consideration over the far greater number of other [usually prior] requesters and appellants who choose not to file suit, or who cannot do so.

* * * * *

Absent some *wholly arbitrary* refusal to expedite a particular request or appeal when exceptional circumstances exist, each individual should be required to wait his or her turn in line. The law as presently written places the burden on the Government to prove that a case should

a remedy from Congress, the Department has apparently chosen this case to seek broad court relief. The majority has obliged—and going beyond the holding which I agree requires this case to be remanded to the district court for further proceedings, delivers dictum accepting the broad premise for relief asserted by the Department of Justice, dictum in which I do not join.

I.

The majority's inclination to speak broadly may be partly explained by the fact that the district court's order declining to grant relief from the Act's strict time provisions² is without explication, providing opportunity to speculate. Whatever the cause, the majority's discussion today ranges more broadly than is necessary to decide the issue in this appeal. The issue is whether the district court abused its discretion in failing to "retain jurisdiction and allow the agency additional time to complete its review of the records" if in accordance with § 552(a)(6)(C), "the Government can show exceptional

not receive preferential, expedited treatment. This imbalance should be corrected, in fairness to other requesters and to eliminate an unnecessary contribution to the congestion of court dockets in the Federal Judicial System.

² The reasoning employed by the court cannot be directly inferred from its order. The district court may have decided, for example, that the short-run bulge of requests plaguing the agency did not constitute exceptional circumstances; or that due diligence had not been demonstrated; or that even if exceptional circumstances and due diligence were made out it did not find the case an appropriate one to grant relief from the normal timing requirements.

The majority speculates instead that the district court's order rested on its finding that plaintiffs had an absolute right to have their request processed within the statutory ten-day and twenty-day periods established under 5 U.S.C. § 552(a)(6)(A).

circumstances exist and that the agency is exercising due diligence in responding to the request." The Government made an uncontested showing by affidavit that FOIA requests have increased at a rate entirely unforeseen and unforeseeable,¹ and that the consequent lag in obtaining and training personnel to deal with these requests has led to a substantial backlog; and that this has made strict compliance with the FOIA time limits impossible. It seems to me that this showing may well constitute the "exceptional circumstances" that combined with a demonstration of due diligence, would warrant allowing the agency additional time under § 552(a)(6)(C).

We need not go any further. The safety valve provisions of § 552(a)(6)(C) were carefully crafted to put a substantial burden on the government to justify to the courts any noncompliance with FOIA time limits. What the majority dictum would contemplate, however, is a scheme that turns the burden of proof mandated by Congress upside down. No longer must the Government make out a case of exceptional circumstances; instead the *plaintiff* will be required to show a "genuine need and reason for urgency." Maj. Op. at 20. This seems to me a clear departure from the very premise of the section we are engaged in interpreting. It is not supported by statutory language, and indeed seems in conflict with the entire remedial thrust of the 1974 amendments to FOIA.

It must be remembered that the 1974 Amendments were deliberately drafted to force increased expedition in the handling of FOIA requests: "[E]xcessive delay by the agency in its response is often tantamount to denial. It is the intent of this bill that the affected agencies be

¹ The Department of Justice Appeal's division had handled 100 appeals in the 12 month period prior to the date the FOIA Amendments became effective; in the next 12 months they received 1276. The FBI in calendar year 1974 had received 447 FOIA requests; in 1975, 13,873 requests were received.

required to respond to inquiries and administrative appeals within specific time limits." H. Rep. No. 93-876, 93d Cong., 2d Sess. (1974), U.S. Code Cong. & Ad. News, p. 6271. Those time limits took into account the objections of such agencies as the Justice Department, by providing that a ten-working-day extension could be allowed for "unusual circumstances," such as where the requested records come from separate field facilities, where the agency must "search for, collect and examine a voluminous amount of separate and distinct records demanded in a single request," or where consultation with another agency is necessary. S. Conf. Rep. No. 93-1200, U.S.C. A.L.N. at 6289. See 5 U.S.C. § 552(6)(B). It is this 10-day provision, specifically anticipating the problem posed by the "voluminous material" request, which was intended to govern in the usual case. The Congress even rejected a 30-day extension provision, narrowly drafted to take account of the special exigencies facing such agencies as the Immigration and Naturalization Service (INS)—which processes an average of 90,000 formal requests for records each year, seeking access to one or more of the twelve million individual files scattered among and frequently transferred between 57 field offices and 10 Federal Records Centers. Even that provision was not intended to have been available to agencies, like D.O.J. in this case, "that simply processed large volumes of requests or frequently faced novel questions of legal interpretation . . . nor could agencies or parts of agencies utilize [the provision] simply because they had been unable to regularly meet standard deadlines, without a showing of the geographical and other concrete obstacles to the location of files or records present in the INS example." S. Rep. No. 93-854, 93d Cong. 2d Sess. (1974), p. 26. It would be anomalous to interpret the "exceptional circumstances" provision relied on by the majority to permit open-ended approval of agency failure to meet the Act's specific time limits, when a much

more rigorous standard for granting a limited 30-day extension was rejected as too lax. See *Hayden v. U.S.* Dept. of Justice, et al., No. 76-0288 (D.D.C., May 21, 1976) at 7-8. The majority's reasoning by implication from the language of the "exceptional circumstances" provision alone can only be sustained if the specific drafting history of the Act we are interpreting is entirely ignored.

It does seem clear to me that absent a special allegation of urgency in processing, the safety valve provided by the exceptional circumstances provision may be available to give relief to the D.O.J. in this case.¹ The unexpected surge in requests combined with the lack of trained personnel qualified to deal with them may meet the government's burden of showing "exceptional circumstances" in the short term. An effective demonstration of due diligence might in turn depend on whether the agency has applied for additional funds to meet the unexpected upsurge in requests, whether it has been or is now willing to allow partial release of documents rather than conditioning release on complete processing of the request, and whether it has or will defer considering any voluntary actions of disclosure which are plainly outside the scope of FOIA, in the interest of expediting disclosure of material expressly covered by the Act.

It should be noted that even a Justice Department failure to make out a case for an "exceptional circumstances" exception, as contemplated by Congress, will not necessarily subject the Department to contempt to coerce compliance. As we recognized in *NRDC v. Train*, 166

¹ See, e.g., *Cleaver v. Kelley*, No. 795-76 (D.D.C. May 27, 1976), where the court found that the unusual upsurge in requests did constitute exceptional circumstances, and that the agency had been exercising due diligence. The court did not consider whether the urgency alleged by petitioners should be considered in making that determination.

U.S.App.D.C. 312, 333, 510 F.2d 692, 713 (1974), "it would be unreasonable and unjust to hold in contempt a defendant who demonstrated that he was powerless to comply." But our ability as an equity court to withhold the contempt sanction when compliance is impossible, should not affect our duty to construe the underlying statute to accord with Congressional intent. The legislature contemplates that the judiciary will seek to define executive compliance according to the legislative mandate. Softening that mandate by construction serves to provide a gloss that the agency is properly performing the duties assigned by the statute, and operates, in effect, to gloss over and screen out any shortfalls in agency performance from the committees and bodies of the legislature. They might otherwise be compelled—by explicit judicial avowal that its decree enforcing the legislative will cannot be enforced by sanctions—to confront the gulf between their expressed will and the practical realities of agency compliance. Adapting what we have said in earlier cases—"So long as [Congress] prescribes a system of [performance] by an agency subject to court review the courts may not abandon their responsibility by acquiescing in a charade or a rubber stamping of [non-performance] in agency trappings." *Public Service Com'n, State of N.Y. v. FPC*, 167 U.S.App.D.C. 100, 116, 511 F.2d 338, 354 (1975).³

II

If the Government has here met its burden for relief from the F.O.I.A.'s specific time provisions because of a short-term inability to cope with a huge jump in information requests, there is no need to seek to forecast the

³ *Texas Gulf Coast Area Rate Cases*, 159 U.S.App.D.C. 172, 205-09, 487 F.2d 1043, 1079-80 (1973), vacated and remanded sub nom. *Shell Oil Co. v. Public Service Comm's*, 417 U.S. 964 (1974), where Judge Wilkey noted: The reviewing court's duty is to "assure fidelity to the functions assigned to the regulatory agency by Congress."

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reasonableness of defendants' administrative approach once adjustments to deal with the increased volume of FOIA requests are fully implemented. However, the majority assumes that the Department's troubles in meeting FOIA's time limits will continue, and the opinion seeks to justify those failures in advance. Those justifications I find to be dubious and problemful.

The Justice Department's first-in first-out approach for handling FOIA applications, which it has adopted as a general rule subject to exceptions,⁶ seems sensible on its

⁶ Defendants' approach admittedly is not strictly first-in first-out. The division of requests into the categories of "project requests" and "non-project requests," see Majority Op. at 12-13, serves the interest in expediting simple requests but means, at the same time, that even though each track is handled on a first-in first-out basis some requests from one category will likely be completed before earlier filed requests from the other category are processed. Similarly, adjustments in the system necessitated by "court orders in cases of genuine need" and agency determinations of cases requiring "preferential handling," see Majority Op. at 14-15, accommodate the interest in timely resolution of pressing matters, but obviously run counter to the first-in first-out approach. Also the Government has to some extent deliberately deferred requests that have entitlement under the Act in order to process other requests. This comes about because of the Government's policy of reviewing all requests for the purpose of exercising its discretionary power to release technically exempt material. The interest in "the maximum possible, responsible disclosure of records" can hardly be faulted and the approach used makes good sense administratively, but this policy of course "is an important factor contributing to the backlog within the Appeals Unit." Letter from Harold R. Tyler, Jr., Deputy Attorney General, to Honorable Bella S. Abzug, Chairwoman, Government Information and Individual Rights Subcommittee, Committee on Government Operations, March 15, 1976, at 2-3, Supplemental Memorandum for the Government Appellants (Attachment B).

Each of these modifications, of course, may be reasonable as a matter of administrative procedure. See footnote 7 *infra*.

face and sound as an administrative method for allocating priority among FOIA requests received by the agency.¹ It is not contested as such, as I understand the position of applicant Open America. However, the processing sequence thus established for the administrative agency or executive respondent processing a request is not impervious to the fact that the filing of a court action is itself a priority-indicating factor of significance. The Act not only authorizes a court action to be filed after notably short periods of administrative consideration, but specifically directs that after the complaint is filed the Government shall file its answer within thirty days, instead of the 60 days normally provided to the Government, and that thereafter the case shall "take precedence" and be "expedited in every way."²

Congress thus made the filing of the action an event that triggers expedition of determination in the court—apart from any expedition in the administrative process. Diligence in seeking court relief is not a fool proof way of assigning priority, but it is material and by no means

¹ The approach in the main is simple, understandable and workable and, in addition, appears to serve the interest in fair treatment. Even the agency-imposed exceptions to a strictly first-in first-out procedure—such as the two track classification or the exception for cases requiring "preferential handling," see footnote 6 *supra*—would appear to have a sound basis.

² 5 U.S.C. § 552(a)(4)(C) sets 30 days for answer (unless the court otherwise directs for good cause shown) in contrast with the 60 days generally available automatically under Rule 12(a), Fed. Rules Civ. Proc.

The precedence and expediting provision appears in 5 U.S.C. § 552(a)(4)(D): "Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

unprecedented. For instance, a debtor normally should pay off debts in the order they accrue. But if a debt is not paid when due, the creditor who goes to court will receive priority over a creditor who waits, for whatever reason. In granting the litigating creditor a priority the court does not inquire as to his motivation or assess his need.

The assumptions which underlie this "race of diligence" concept are not without meaning for applicants under FOIA. There are common and sensible reasons for choosing not to sue despite the priority awarded to litigants, as in the case of creditors who may be willing to await delayed payment or even risk nonpayment in hopes of future business. Similarly, FOIA applicants may reasonably believe that by cooperating with the agency they may enhance the possibility of obtaining more complete information from the agency, for instance through a favorable exercise of the agency's discretion to release certain technically exempt material. The merely curious may well be motivated enough to write a letter, but not to file a law suit.⁹

This marks no discrimination on ground of wealth, as the majority assert, for Congress has provided litigation costs and attorney's fees.¹⁰ In this setting, we can-

⁹ There is at least some reason to believe that at this early stage of FOIA operations the merely curious may predominate among all applicants. See also footnote 10 *infra*.

¹⁰ The majority apparently concedes that granting litigants priority rationally serves the legitimate purpose of separating those applicants with a significant concern from the merely curious who "would be content to have their curiosity satisfied in six to nine months." Majority Op. at 18. It argues, however, that giving litigants priority would create an "invidious and unintended distinction" based on wealth. *Id.* Congress, however, considered the important role of the courts in enforcement of FOIA and provided for the award of "at-

not say that diligent litigation is without significance as a rough indicator of priority. A priority continually unfolding on that basis is reasonable enough and does not conflict with the FOIA provision that an applicant is not required to show "need" to be entitled to relief.

III

A disquieting feature in the majority opinion is its willingness to inquire about defendants' resources as a predicate for determining the rights of the parties.

In general, the courts are established to declare rights, and they should not take into account the resources of the defendant as a reason for not declaring a right. Otherwise, the courts will have to go beyond examining the relationship of the parties, generally a sufficiently difficult task, and go into the relationship of the defendant to all other persons having a claim upon him, an essentially unmanageable task. In certain structured instances the courts have been asked or even compelled, to adjudicate competing and conflicting claims upon a single defendant.¹¹ And there certainly is some room for a court in equity to stay its hand, and to forbear from enforcing a declared right in cases where the defendant is called upon to do the impossible.¹² But absent a clear statutory mandate or extraordinary circumstances a court does not normally inquire into a defendant's resources

torney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E).

¹¹ Interpleader under Rule 22, F.R. Civ. P., and proceedings in bankruptcy are instances in which courts may be obliged to examine all claims of a particular kind presently assertable against a single defendant.

¹² See, e.g. Maggio v. Zeitz, 333 U.S. 56 (1948); Natural Resources Defense Council, Inc. v. Train, 166 U.S.App.D.C. 312, 333, 510 F.2d 692, 713 (1975).

in order to determine whether to declare a right claimed by plaintiff.¹²

If a court is to go beyond the relationship of the parties toward acceptance of an unqualified defense of presently inadequate resources, how is it to determine that the defendant has done all that can reasonably be expected of it in acquiring adequate resources or in efficiently managing the resources it has? And in the case of government agencies, should the court fully examine the agency's management in order to decide if a defense is available? I do not think courts should make such an inquiry beyond the limited function opened up by Congress—of deciding a government's prayer based on exceptional circumstances and due diligence, as contrasted with its steady burdens.

A court considering a prayer for relief against an agency normally acts in relation to the case before it without inquiring into the impact of its order on other activities of the agency. Everytime a court remands for further proceedings within a specified time it may be requiring an agency to shift its normal allocations of business in order to comply.

The majority's opinion appears to go well beyond the peculiar circumstances of the instant case. It seems to conclude rather broadly that whatever the cause of the volume of requests confronting it, an agency complies with the Act so long as it processes those requests in "good faith" and with "due diligence" by "assigning all requests on a first in, first out basis, except those where exceptional need or urgency is shown," no matter what

¹² Quite different considerations are involved when a court stays its hand to require exhaustion of administrative remedies. That is a judicial doctrine, it is subject to an exception for delay, and in FOIA it has been overridden by a Congress solicitous lest it be the plaintiff who is exhausted rather than his remedies.

delay is caused thereby.¹⁴ If so then one may wonder, along with plaintiffs, whether such a broad defense will become in effect a self-fulfilling prophecy in derogation of Congressional intent for expedition. At a time when all agencies have abundant work apart from FOIA, it is reasonable to ask what impetus will remain for agencies to adjust to the explicit time limits imposed by Congress if the Act is interpreted to grant them leeway so long as requests are processed in the order of their arrival.

I would at this point simply vacate the order of the District Court and remand the case for a determination whether defendants are entitled to any relief under 5 U.S.C. § 552(a)(6)(C) in light of the probable existence of "exceptional circumstances." I concur in the order of remand and in that much of the majority opinion. The rest of the majority opinion is overly broad in its interpretation of § 552(a)(6)(C); as currently premised is inconsistent with the mandate of Congress; and in any event is premature.

¹⁴ Majority Op. at 21.

THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

MAR 15 1973

Honorable Bella S. Abzug, Chairwoman
Government Information and Individual
Rights Subcommittee
Committee on Government Operations
Rayburn House Office Building, Room B-349-B-C
Washington, D. C. 20515

Dear Chairwoman Abzug:

This constitutes the Report of the Department of Justice to Congress covering Freedom of Information Act operations during calendar year 1975. At Tab A are the data required by the Act of every agency, in the format requested in your letter of July 1, 1975. At Tab B are the additional data required to be submitted by the Attorney General concerning cases arising under the Act and the efforts undertaken by the Department of Justice to encourage agency compliance with the Act throughout the Government.

In reviewing all of the data submitted herewith, I must state that much of it is disturbing to me and others interested and involved in F.O.I.A. matters. The receipt of over 30,000 requests for access, a number far in excess of what anyone had anticipated, has transformed this into a major area of Departmental operations. Over 120,000 man-hours are reported as having been expended, the majority by attorneys and supervisors, and these constitute only a partial accounting for the total personnel effort within the Department. These figures demonstrate the adverse impact on this Department's ability to carry out its traditional substantive missions during the past year. Moreover, the figures for the first two months of 1976 offer no indication that the tide is ebbing. Through March 5, for example, the Federal Bureau of Investigation has received in excess of 2,500 new requests for access to its records.

One of the provisions in the amendments to the Act that certainly has not worked out as anyone intended is the

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imposition of very short time limits for the processing of requests. I fully understand and accept the desire of Congress to demonstrate the importance it attached to the reasonably expeditious processing of requests for access to records. In my opinion, however, any time limit that does not take into consideration the number and complexity of the records within the scope of the individual request is both unrealistic and wholly unworkable. Requesters have tended to word their requests as broadly as possible in an understandable effort to ensure that they encompass all records in which an individual has an interest. There is no effective mechanism under the Freedom of Information Act for requiring a requester to cooperate with the Department in an attempt to aid us in locating records of particular interest with a minimum expenditure of our personnel resources, although some requesters have done so willingly. Under these circumstances, once the flood of requests developed, it almost immediately became impossible to comply with the time limits in many of the components of the Department. The unfulfilled expectations of the requesters were then reflected in innumerable letters, telephone calls, complaints to Members of Congress, etc., responding to which served only to slow down even further the processing of the requests themselves. It is the large number of requests, however, encompassing thousands and tens of thousands of pages -- some, at least, among the most sensitive in the files of the Department -- that has tended, more than any other single factor, to slow down the processing of the far greater number of requests involving much smaller quantities of records. This entire area of time limits, viewed in the light of the total number of requests we have received and the significant fraction thereof involving large quantities of records, is one to which I hope your Subcommittee will give serious attention in the near future.

The results of our inability to comply with the letter of the Act as to time limits have been exacerbated by our efforts to comply fully with its spirit. At all times during my tenure as Deputy Attorney General, I have attempted to effect the maximum possible, responsible disclosure of records. It is clear that the Department of Justice is in fact releasing a considerable quantity of technically exempt material. My own view, as you know, is that an exemption is nothing more than a lawful excuse to withhold a record. I stress that access should not be denied unless some reason for doing so exists in terms of the present vital interests of the Department. My insistence on conformity with this policy, however, is an important factor contributing to the backlog within the

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Appeals Unit. In addition to reviewing withheld materials to ascertain whether they are or are not exempt from mandatory release under the Act, its personnel must also review the exempt materials with a view towards a possible discretionary release, either by the component itself in the form of a supplemental release, or at my direction in the final action on the appeal. To be absolutely candid, it would be far easier for this Department to follow a practice of merely releasing that which is not exempt and withholding that which is. Certainly we could process our appeals more expeditiously. Revisions in the letter of the Act could have a great impact throughout the Executive Branch in terms of encouraging an attitude more favorably inclined towards releasing records, rather than seeking to withhold them.

There is one additional serious problem I desire to bring to your specific attention. That is the situation created by those cases in which we are sued before the administrative review process has been completed. Although the number of such cases is not particularly great, this unfortunate provision in the Act usually results in the individual who has sued receiving preferential consideration over the far greater number of other [usually prior] requesters and appellants who choose not to file suit, or who cannot do so. Congress has directed the courts, absent "exceptional circumstances" [5 U.S.C. 552(a)(6)(C)], to give these cases precedence on the docket and to expedite them "in every way." 5 U.S.C. 552 (a)(4)(D). Several cases in which courts have sought to carry out this Congressional intent have involved tremendous quantities of records; others have involved closely related, ongoing criminal investigations, so that the records have been not only voluminous, but also extremely sensitive. Over the objections of this Department, rigorous time schedules for the processing of the records in these cases have been imposed by the courts involved, to the principal detriment of the several thousand other requesters and hundreds of administrative appellants who must then wait even longer for action on their requests than would otherwise be the case. In my judgment, this result is grossly unfair in most instances. Absent some wholly arbitrary refusal to expedite a particular request or appeal when exceptional circumstances exist, each individual should be required to wait his or her turn in line. The law as presently written places the burden on the Government to prove that a case should not receive preferential, expedited treatment. This imbalance should be corrected, in fairness to other requesters and to eliminate an unnecessary contribution to the congestion of court dockets in the Federal Judicial System.

Within this Department, there have been instances in which individual cases were expedited administratively for cause. Such instances have been rare, however, which is as I believe it should be. No one anticipated the flood of requests and appeals following the effective date of the amendments to the Act. This Department's allocation of resources [currently, for example, approximately 175 in the F.B.I.'s Freedom of Information and Privacy Section -- including 25 Special Agents -- and 25 more in my own Appeals Unit] has been extremely generous. Relief could easily be granted in this area, with such issues as the allocation of resources and speed of processing being viewed as matters for Congressional, not Judicial, oversight. As it is now, we must take our personnel off cases on which they are already working, simply because some other individual or group with the inclination and resources to file suit refuses to wait in line. I strongly suggest that, in accordance with your letter of July 1, 1975, this provision of the Act should be considered by your Subcommittee for revision. As a minimum, the individual who chooses to file suit before the administrative process has been completed in his case should face a heavy burden of showing that truly exceptional circumstances exist that require expedited consideration of his request or administrative appeal and that the agency has refused to grant a specific request to do so.

There are, of course, many other problems, some of them quite serious, presented by the Act in its present form. I hope that these will also receive sympathetic consideration from your Subcommittee in the near future. Some of them would be at least partially resolved by a critical reexamination of the many substantive and procedural inconsistencies between the Freedom of Information Act and the access provisions of the Privacy Act of 1974. I would welcome the opportunity, both personally and through our respective staffs, to explore these matters with you more fully in the near future.

In conclusion, although I am not completely satisfied with the results we have achieved to date, it is my firm, overall judgment that the Department of Justice has performed well in this area during the past year under extremely arduous conditions. It remains my hope that cooperation between the Legislative and Executive Branches will result in the necessary and reasonable reformulation of the Act which would permit a substantial portion of the personnel now working in this area to return to the traditional substantive missions of the Department of Justice.

while continuing to meet the principal goals of the Freedom of Information Act.

Sincerely,

Harold R. Tyler, Jr.
Harold R. Tyler, Jr.
Deputy Attorney General